THE

MONTHLY LAW REPORTER.

MAY, 1857.

CONSTITUTIONAL LAW. ELECTION OF SENATORS OF THE UNITED STATES.

MANY points of constitutional and parliamentary law, are constantly coming up in the legislatures of the States and of the nation, and which must necessarily be decided by the bodies in which they happen to arise, but which are often interesting in themselves, and deserving of record here, from the very fact that they do not find their way into any book of permanent reports. We have recorded some of these from time to time, and intend to do so still more in future.

One of the most common and yet important of these topics touches the true mode of electing Senators of the United States. No less than three of these cases have been before the tribunal of final resort, the Senate itself, during the session recently closed. The first dispute, and that which may be said to have caused the others, was upon the election of the Honorable James Harlan, of Iowa.

It occurred in this wise. Our readers will recollect the provisions of the Constitution of the United States, that the Senate shall be composed of two senators from each State, to be chosen by the legislature thereof; and that the legislature of each State may prescribe the time, place, and manner of holding elections for senators, with a right reserved to Congress, but which it has never exercised, to make or alter such regulations.

For the last fifty years or more it has been the custom in many of the States, to elect senators by a joint ballot of the members of the two houses of the State legislature met in convention, and this was the mode adopted by law in Iowa. Chancellor Kent, and other approved writers, have expressed the opinion, that a literal construction of the constitution would perhaps require a *concurrent* vote of the two houses acting separately, but that long practice and acquiescence had established that either plan might be followed. And it has been generally agreed that the election of senators is not a legislative act, in such sense as to require all the usual forms of legislation, for instance, the assent of the Governor of the State, to be strictly followed.

The law of Iowa passed in 1847, provided that at the regular session of the General Assembly next preceding the expiration of the constitutional term of a Senator of the United States, the two houses should meet in convention in the hall of the House of Representatives, at an hour to be named by one house, and concurred in by the other, for the purpose of electing a senator by joint vote. The President of the Senate, or in his absence, the Speaker of the House of Representatives, should preside over the convention. Each house should appoint a teller, and the two tellers should act as judges of the election, with defined duties, however, which are merely ministerial. The names of the members of both houses to be arranged alphabetically, and the voting to be in that order, and a vote of the majority of members present, to elect. If the election should not be effected at the first meeting, the president should adjourn the meeting to such time as a majority of the members then present should determine, and so from time to time, until some candidate should receive a majority as aforesaid.

The General Assembly of Iowa, sitting in the winter of 1854–5, was authorized and required by this law to elect a senator in place of Mr. Dodge, whose term was about to expire. On the 13th of December, 1854, the two houses met in convention, and were duly organized, and voted several times without electing a senator. The convention was duly adjourned from time to time, sometimes for one day, and sometimes for more, until the 5th of January, 1855, when it was duly adjourned to meet the next day at ten o'clock in the forenoon.

It seems that party spirit was high in the legislature of Iowa, and the two houses were not agreed either as to

measures or men, the House, being, by a small majority, in favor of Mr. Harlan, and the Senate preferring his opponent. It is fair perhaps to conjecture, that the democratic party which was strongest in the Senate, was slightly outnumbered on a full vote of both houses. At all events they did not feel very anxious to go into convention on that Saturday morning. The Senate met on that morning, and before ten o'clock, adjourned over to the following Monday. The House assembled and sent word, as they usually did, though from courtesy only, as it would seem, and not because any law or established usage required them to do so, sent word by a messenger, that they were ready to receive the Senate. The messenger returned and reported that he could not find any Senate. In the meantime most, if not all of those senators who agreed in opinion with the majority of the House had come in, — a fact which went to show pretty distinctly that the adjournment of the Senate was not accidental, — and the sergeant-at-arms was directed to bring in such others as he could find. This functionary succeeded in procuring "from the taverns," as the debate has it, two recusant democrats, "who desired to be considered as not acting in the convention." As thus made up, the convention contained an actual majority of both houses, unless the convention granted the somewhat remarkable request of the two captive senators, which they do not appear to have done. Some of the officers, however, were absent, especially the president and teller of the Senate. The convention proceeded to choose a teller, and a president *pro tempore*, of the Senate; and to make all sure, the Speaker of the House also acted jointly and equally, as it would seem, with the president *pro tempore*, in all matters requiring the action of the presiding officer of the convention.

The body thus constituted chose Mr. Harlan as Senator of the United States, and his certificate of election, and all the other necessary papers, were authenticated by the signature of both of the presiding officers above mentioned. The validity of his election was contested at the last regular session of the Senate, and was referred to the judiciary committee, who made a majority report, presented by Mr. Butler of South Carolina, against his right to the seat, and a minority report through Mr. Toombs of Georgia, in his favor. The case was very ably argued on both sides by these gentlemen, and by many other members. The arguments may be given shortly thus. In behalf of the majority opinion, it was said:

First. The Constitution requires the election to be made by the legislature of the State, it must therefore be done substantially by both houses, as distinct bodies; and although they may meet and act together, yet their individuality must be preserved. The mere fact that a majority of the joint body, or even of each body, is present, does not constitute the aggregate body a legislature, unless the two bodies acting separately have voted to meet, and have actually met accordingly. Granting that the convention was once duly organized, and that it had the right to adjourn, still the separate houses retained their full rights, and might at any time reconsider their determination, and vote not to proceed with the election. The Senate of Iowa might, after the adjournment on the Friday, vote not to go into convention on the next day; and by voting to adjourn over to the Monday, they did in effect so vote, for the two things were entirely inconsistent. The legislature of Iowa could not, by a general law, abridge the rights of future assemblies, and if their law of 1847 be construed to destroy or abridge such rights, it is so far unconstitutional and void. The supporters of the sitting member must take the position that the joint body, so called, could proceed to election against the protest of a majority of one house, and while that house is actually sitting elsewhere, and transacting other business.

Second. The convention, even if duly constituted, and duly met by adjournment, could not lawfully elect a presided *pro tempore* of the Senate, because they had no control direct or indirect over the Senate, as such, nor any right to interfere with its organization.

Third. The convention had no authority to appoint a teller in place of the absentee, who had been originally and duly appointed on behalf of the Senate.

In support of the seat it was said, on the other hand:

First. The constitution had by long and admitted usage been so construed, that a joint convention of the two houses made a "legislature" within its terms. If so, then it followed that the joint body thus constituted was to be governed by the law under which it was formed, and by the usage of assemblies of that character. Both by the express terms of the law of Iowa, and by the general usage, a majority of such a body formed a quorum, and a majority of those present could transact any business lawfully before them, and could adjourn to any time they might choose to designate; such an adjournment was duly made, and

bound all the members of the body, whether senators or representatives, and upon the arrival of the time to which the convention was adjourned, and a quorum being present, it must follow that an election might lawfully be held. The constitution as habitually construed, together with the law of Iowa, confer the right of election upon the *members* of the two houses, after they have once come into convention. There is nothing in the Constitution of the United States, nor in that of Iowa, to prevent the legislature of the latter from enacting that for the purposes of an election of this kind the two houses shall form one body. It has happened repeatedly that a senator has been elected against the vote of a majority of one or the other house. In Virgina, although the two houses vote separately, yet the person who has the largest majority is elected, although he be actually in a minority in one House. In other States, where a joint committee is held, (and this is the custom in nearly all the new States, and indeed in all out of New England,) the person having a majority of the whole number of votes is elected. It follows from these positions, and may be admitted, that after the convention has been duly constituted, neither House can by any separate vote or act, dissolve it, and that its proceedings, when a quorum of the joint body is present, will be valid, notwithstanding a quorum of one of the houses may be absent, and even engaged in legislative business elsewhere.

Second. Granting that the convention had no right to appoint a president *pro tempore* of the Senate, yet it appears in fact, that the Speaker of the House of Representatives was also present, and did all the acts required of the presiding officer, and the acts and certificates of the other person are mere surplussage.

Third. The duties of a teller being merely ministerial, could in his absence, be performed by any person whom convention might choose to appoint for that purpose.

We believe this summary gives the arguments on both sides with sufficient fulness. The main question is one of much importance, and had never before been decided. Upon the established construction that a joint convention of the two houses is sufficient to satisfy the constitution, we are inclined to think the argument was with the minority. However, as the arguments above given will enable our readers to judge for themselves, we will not further discuss it. It was perhaps more important that the point should be decided and the decision generally understood, than which

way it should be settled. The senate on the 12th of January, 1857, decided in favor of the majority report and unseated Mr. Harlan, by a vote of 28 to 18.

The case of Mr. Cameron, elected as a senator for Pennsylvania, came next. The objection there taken was, that the tellers were not duly appointed before going into convention. But the Senate thought that the proceedings were sufficiently regular, and confirmed the election. A question has since been raised upon the election of the senators for Indiana. As this case has not yet been decided, we will not consider it, excepting to say, that apparently upon the facts as they are now stated, it would seem to fall within the precedent of the Iowa case. But new developments may vary this appearance.

RIGHTS AND DUTIES OF JURORS. DUTY OF COUNSEL TOWARDS JURORS.

The cases of *Commonwealth* v. *Magee*, and *Commonwealth* v. *Cater*, which were tried in the early part of April, before three justices of the Supreme Judicial Court of Massachusetts, sitting at Boston, excited much interest from the circumstances of the homicides which were to be investigated. Both of the prisoners had been convicts in the State prison at Charlestown, and both had, in broad day, and with evident deliberation, murdered, one the deputy warden, and the other the chief warden of that institution. The manner and circumstances of the crimes, and the fact that they were nearly contemporaneous, had excited a deep and universal feeling of fear and horror, had led to investigation by the legislature into the government of the prison, and had undoubtedly exerted an influence upon the recent alteration of the law by which the punishment of such offences has been somewhat modified.

There was nothing, however, in the nature of the evidence adduced, or of the defence, to mark these trials out as leading or unusual cases. The defence in each was insanity, but the proof was not sufficient in either to satisfy the court or the jury, by the preponderance of evidence, that the prisoners were not legally responsible, and they were both convicted, and sentenced to suffer the extreme penalty of the law.

We notice these cases partly to note the result of the

trials, and partly for an incident which occurred on the first trial of Magee, (who was twice tried,) and which, as it has been the subject of some comment by the bar and by the newspapers, and as it touches nearly the duties and rights of counsel and jurors, ought to receive some consideration at our hands.

On the first trial of Magee, the jury were out a considerable part of one day and all night, had reported that they were unable to agree, and were discharged from the further consideration of the case. The attorney-general then submitted to the court the following communication signed by eleven of the jurors, and handed to him since their discharge:

"Boston, April 3, 1857.

John H. Clifford, Esq.: — Dear Sir: — Immediately after receiving this case into our hands, we took an informal ballot to see how we stood in regard to the guilt or innocence of the prisoner, Magee. On that ballot we stood eleven for conviction to one for acquittal. That one was Mr. J. F., [the foreman.] Since that ballot we have been diligent in our inquiries as to the reasons for his opinion. He gave various reasons for it; among them was that he believed *no man* can commit an act of murder unless under a delusion, and further that he cannot convict a man who commits a murder under a delusion; and again he says that he does not think that the delusions of Magee are strong enough to constitute insanity. At another time he stated that he had made up his mind before the evidence of the case was all in.

Being placed in the position that we are, we thought we would write these facts to you, so that you might know our position."

The attorney-general further stated, that from statements of the junior counsel for the defence, he had learned that he had had some conversation with the juror, and had some reason to suppose that he might be opposed to capital punishment; and, without imputing any improper motives to that gentleman, he felt it his duty to submit the facts to the court. It was for them to consider whether counsel holding such views of professional duty as warranted any conversation with a juror in reference to the case to be tried, was a proper person to conduct the defence of a capital cause under the appointment of the court.

It appeared that the counsel referred to was well acquainted with the juror, and casually met him after the jury were drawn, but some time before the trial, and allusion being made to the case, the counsel said, "I don't know about you countrymen, you are sharp for hanging," or something to that effect. And that he had held some conversation with him in the court room, in which the juror said that he had no settled opinions on the subject of capital punishment.

The court remarked upon the impropriety of counsel holding any communication with the jury, but considered that the error in this case was not wilful, and that they were not called upon to take any action on the subject.

The juror implicated by his fellows has since explicitly denied, in the newspapers, the charges which they made against him, and has declared that his opinions would not prevent him from finding a verdict of guilty if proper evidence were produced.

The discussion to which we alluded has turned upon the propriety of the conduct of counsel on either side; and it has been mooted whether the counsel for the defence exceeded his rights in speaking to the juror, and whether the counsel for the government was well advised in receiving and reading to the court a statement of what purported to have taken place in the jury-room.

It seems to us that both counsel were hurried by their honest zeal for the success of their respective causes, into acts which, while they may have done no actual harm in the particular case, must yet be pronounced irregular, and held up as precedents to be avoided.

All *ex parte* communications between counsel and jury in reference to pending cases, are to be scrupulously avoided. Such communications are dangerous; more so of course while the jury are charged with the case, but to some extent also before they are impanelled, or after they are discharged; and whether the communications are intended to be private or not. If private, there may be suspicion of undue influence, tending to affect the issue of the particular case; if to be made public, there may arise an appearance of dictation which would injure the cause of public justice in general. And the rule, of course, applies to all counsel, whether retained by individuals, or performing by appointment or election the public duty of prosecuting or defending public criminals.

We all know how careful the best judges are not to talk with counsel upon cases which are to come before them; and it is much more important that jurors should imitate this reserve, as their habits and training are likely to expose them to much greater danger of prejudicial influence. While, therefore, we admit to the fullest extent the right of a prisoner to discover by all proper methods the character and antecedents of the "country" by whom he is to be tried, and to exercise his right of challenge in view of the information he may obtain, yet he must not approach or apply to the jurors themselves, directly nor indirectly.

On the other hand, it is not easy to overstate the evils which must follow from publishing the private consultations of the jury. In order that these consultations should be free and impartial, it is absolutely essential that they should be secret. And in our opinion it would be well if traverse juries were formally put on their guard upon this point, as grand juries by long and excellent usage invariably are.

We consider the custom which now prevails pretty extensively in this country, and is sanctioned by some statutes, of questioning jurors as to their having opinions of the case, or of the constitutionality of this or that law, as evils, probably necessary if the laws are to be enforced, but at all events evils. It may, perhaps, be a fair question, whether it does not trench upon the right of jury trial, as understood when most of our State constitutions were adopted. It is a mode of probing tender consciences, which the English government would have been glad to know of in those old times to which we look for many of our precedents on these subjects, and which would probably have rendered some famous State trials quite otherwise famous than they now are. Some of our readers will recall an article on the subject in the Law Reporter for September, 1846.

However this point may be decided, while it is undoubtedly the duty of jurors to obey the law by which they are impanelled, without subterfuge or casuistry, we hold that the prisoner has a clear right to the unbiassed judgment of these jurors, and each of them, however wise or however foolish they may happen to be; and whoever succeeds by pressure or influence, public or private, to abate one jot or tittle of such wisdom or folly, to that extent deprives the party of his just constitutional rights.

Observe the obvious effect of making public the deliberations of the jury. The minority, in this country of tyrannical majorities, will be ridiculed, bullied, or insulted, for opinions honestly formed, though perhaps wrong, or ill-defended in argument. In the next case of great local or general interest there will be no minority, and the safeguard intended by the law in requiring the jury to be unanimous is gone. This is no merely speculative opinion; already since this case occurred, we have seen in the newspapers the names and votes of all the juries in a criminal case of much notoriety, which was tried in our immediate neighborhood.

The law therefore, following the wise lead of Lord Mansfield, has repeatedly decided that jurors cannot be permitted nor compelled, for any purpose of the trial, or of any future trial of the cause, to state even on oath the secrets of the jury-room. See 1 Greenl. Ev. § 252*a*; *Boston & Worcester R. R. Co.* v. *Dana*, 1 Gray, 105; *Cook* v. *Castner*, 9 Cush. 278.

Some surprise has been expressed that the Court allowed this statement of the jurors to be read. But no objection was made by the counsel for the prisoner, and the court of course could not know beforehand the exact nature of the communication. It is to be observed, too, that they took no action upon it, and cannot therefore be considered as having sanctioned the irregularity.

CONSTITUTIONAL LIMITS OF LEGISLATIVE POWER.

An important question of constitutional law has been raised in the Massachusetts Legislature, growing out of a matter which on its own merits was of no great importance.

A resolve was passed requiring the Secretary of the Commonwealth, and other state officers, to furnish at the same time to all daily papers published in Boston, all public notices, if any, from the executive departments at the State House, and designed for general information.

His Excellency the Governor, declined to sign the bill, and returned it to the House of Representatives in which it originated, with his objections, the principal of which was that he considered it an encroachment upon the freedom and privileges of the executive department, and an interference with its functions, and therefore in conflict with that provision of the Constitution of Massachusetts which declares, "that the legislative department shall never exercise the executive and judicial powers of either of them . . . to the end that it may be a government of laws and not of men."

The resolve thus returned by his Excellency, was again passed in the House of Representatives, notwithstanding the veto, by the requisite constitutional majority of two thirds. The Senate, acting as we think, more advisedly,

and with greater dignity, refused so to re-enact this particular act, but appointed a special committee to consider and report "what are the just limits of legislative power under the Constitution, and whether it is expedient for the two branches to express any opinion concerning the same." This committee made an elaborate and able report and resolves upon the subject submitted them.

The resolves were not in such form as to require executive sanction, being merely an expression of opinion of one department of the government, upon a question at issue with another department, but they appear to us to contain a correct statement of the points in controversy, and the fact that they have been passed, is of itself important to be recorded.

They were passed in the senate 1857, by a vote of
and in the house, 1857, by a vote of

The resolves, omitting the preamble, were as follows:—

"*Resolved*, That we view with deep regret, the official communication from his excellency the governor, of the opinion that it is not competent for the legislature to prescribe duties to the executive officers of the State, opposed as such opinion seems to us to be to the clear provisions of the Constitution, and to the uniform practical construction which it has received since its adoption.

Resolved, That the provision of the Constitution that "the legislative department shall never exercise the executive and judicial powers, or either of them," was designed soley to prohibit the *exercise* by the legislature of executive and judicial functions, and not to prevent the legislature from directing the performance, by either of those departments, of such executive and judicial duties as it shall see fit to presribe, full power and authority being in the Constitution expressly "given and granted to the General Court, from time to time, to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, so as the same be not repugnant or contrary to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and for the government and ordering thereof, and to set forth the several duties, powers and limits of the several civil and military officers of this Commonwealth, so as the same be not repugnant to the Constitution."

Resolved, That the power now denied by his excellency, has been exercised by the legislature, without question, ever since the adoption of the Constitution, and in numerous important cases; among others —

In providing for the reporting and publication of the decisions of the Supreme Judicial Court : —

In directing the order of business in said court; fixing the times and places of the sessions of the same ; providing what number of justices shall be a quorum thereof, and assigning new duties thereto : —

In directing the governor to appoint officers created by the legislature, and providing from what persons such appointments shall be made : —

In providing for the publication of the laws of the Commonwealth, and directing in what newspapers the same shall be published : —

In providing for the submission to the people of proposed amendments to the Constitution of the Commonwealth ; directing his Excellency to count the votes of the people upon such amendments; directing the time and manner of such count, and the mode in which the result of the same shall be proclaimed : —

In directing the mode of execution of criminals; at what times and to what persons the warrants for such execution shall issue; in ordering the respiting, by his Excellency, of such execution in certain cases, and providing how such warrants shall be authenticated.

Resolved, That the end that it be a government of laws and not of men, would hardly be attained by a construction of the Constitution which exempted any officer or class of officers from the power of the law.

Resolved, therefore, That it is competent for the legislature to regulate by law, all the duties of the several officers of the Commonwealth, and to provide the manner of publi cation of all such official acts, where such regulation and provision is not expressly made in the Constitution."

Supreme Court of Michigan. March 1857.

Case made from Wayne Circuit.

Henry T. Backus v. Henry Byron.

An agreement between attorney and client, by which the latter is to advance the necessary expenses of the suit, and in the event of failure the former to have nothing for his services, but in case of success to be entitled to a fraction of the property recovered, or its money value, is void for champerty.

Green, J. — This was an action of assumpsit brought by the plaintiff to recover for his services as an attorney and counsellor at law, rendered in a suit brought by the defendant against one Joseph Nothrop, under a special contract or agreement.

The defendant Byron, claiming to be the owner in fee of five sevenths of a certain lot in the city of Detroit, which at that time was held adversely by Nothrop, employed the plaintiff to prosecute a suit in ejectment to recover the interest which he claimed in the premises. The ejectment suit was accordingly brought and prosecuted to a successful termination in November 1851, having been twice tried.

The agreement between the present plaintiff and defendant as to the compensation of the plaintiff for his services in the ejectment suit, as found by the court below, was as follows: Byron was to advance the necessary expenses to carry on the suit, and in the event of a failure to recover, Backus was to have nothing for his services; but in the event of a recovery, he was to have an undivided seventh of the property, or the value of that one seventh in money, at the option of Byron.

On the trial of this cause before the court, without a jury, it was insisted on the part of the defendant that the agreement was void on the ground of champerty, and that the plaintiff was not entitled to recover thereon. The court held that the agreement was not void, and rendered a judgment in favor of the plaintiff for damages and costs, whereupon the defendant excepted to the ruling of the court.

The case shows that there was some apparently conflicting testimony upon the trial in regard to the terms of

the contract in question, and it is assumed on the part of the plaintiff that the weight of the testimony shows an agreement essentially different from that found by the court; an agreement wherein the property sought to be recovered was referred to merely as a measure of the compensation for the plaintiff's services, and not as forming the compensation itself. Without expressing any opinion whether in a case made after judgment for the purpose of review, this court will undertake to weigh conflicting testimony, it is sufficient to remark here, that the finding of the court was in accordance with the testimony of the only witness who pretended to have heard the agreement made between the parties, and also that we must presume, (the pleadings not being before us,) that it was in accordance with the special contract or agreement under which the plaintiff sought to recover.

The grave question is thus presented to this court for the first time during its existence, whether such an agreement between an attorney and his client can be upheld and enforced by the law of the land, or whether it is void on the ground of champerty.

That champerty was regarded as *malum in se*, and an offence of a high grade at the common law, which rendered void all contracts tainted with it, cannot be questioned. Barratry and maintenance, (of which latter champerty was regarded as the most odious species,) were offences of kindred character, tending to strife, oppression and injustice, and the perpetrators thereof were visited with grievous punishments.

Our attention will first be directed to the inquiry, what constitutes champerty at the common law? Hawkins defines it to be "the unlawful maintenance of a suit, in consideration of an agreement to have part of the thing in dispute, or some profit out of it." Hawkins, P. C. ch. 84, § 1. Lord Coke says that it is "to maintain to have part of the land, or part of the debt or other thing in plea or suit." Co. Lit. 368. Chitty defines it to be "a bargain to divide the land (*campum partire*) or other subject in dispute on condition of his carrying it on at his own expense;" and this is the definition given by Sir Wm. Blackstone, 2 Chitty's Cr. L. 234, note A.; 4 Bl. Com. 135. Sir Wm. Grant, in 15 Vesey, 139, says champerty "is the unlawful maintenance of a suit in consideration of a bargain for a part of the thing, or some profit out of it;" and this definition is quoted by Tindall, C. J., in *Stanley* v. *Jones*, 7 Bing. 936.

Although there is considerable diversity in the language used by these and other authors in describing this offence, yet I think that upon examination it will appear that they all agree in substance. When it is considered that champerty is a species of maintenance, it is clear that all these definitions import that the party bargaining for an interest in the thing in dispute, undertakes to aid in the prosecution of the suit for its recovery, and whether such aid is furnished in money by a layman who pays the expenses of the suit, or by an attorney or solicitor in services rendered in its prosecution, it is the same, and each alike in effect amd contemplation of law, is a maintenance of the suit. The consideration paid in the latter case would be equally as valuable as in the former, and the inducement to prosecute a doubtful or unconscionable claim would be the same, and the evil, if any, the same. It is equally champerty whether the contract be for one half, one quarter, or one eighth, of the thing in dispute, and it would be strange indeed if the validity or invalidity of a contract of this character were made to depend upon the *amount* of the consideration to be paid, or in other words, upon the payment of a *part* or the *whole* of the expenses of the suit. If the act were only *malum prohibitum*, the statute defining the offence, and declaring its consequences would require a strict construction, according to a familiar rule; but when an act constitutes an offence at the common law, verbal criticisms upon the language used by authors in defining it, not based upon some substantial ground of reason, are entitled to but little notice.

Champerty, as thus defined, being an offence at the common law, is it recognized as such by the laws of this State? Section 22 of ch. 161 of the Revised Statutes (p. 689) provides that "every person who shall commit any indictable offence at the common law, for the punishment of which no provision is expressly made by any statute of this State, shall be punished by imprisonment in the county jail not more than two years, or by fine not exceeding two thousand dollars, or both, in the discretion of the court." This provision is very general in its terms, and fully recognizes as in force the rules of the common law which ascertain and define what acts constitute offences. If champerty, therefore, is such an offence at the common law, it is unlawful in this State, unless, as is claimed on the part of the plaintiff, the reason of it has ceased to exist, which will be considered hereafter.

For the purpose of illustrating the doctrine of champerty and maintenance in reference to their effects upon contracts at law and in equity, the following English cases may be consulted. *Wallis* v. *Duke of Portland*, 3 Ves. 494; *Powell* v. *Knoller*, 2 Atk. 224; *Stevens* v. *Bagwell*, 15 Ves. 139; *Wood* v. *Downs*, 18 Ib. 120; *Newman* v. *Payne*, 3 Ib. 203; *Welles* v. *Middleton*, 1 Cox, 125; 7 Bing. 369.

No question being made as to what is the law in England upon this subject, it is not necessary to review any of these cases; but inasmuch as it has been supposed that under the state of society existing in the American States, it is not applicable here, it seems proper to examine a few of the leading American authorities upon the subject, in order to glean from them whatever light they may throw upon the questions before us, and to see how far, and under what circumstances, it has been held to apply to contracts between attorney or solicitor and client.

The case of *Brown* v. *Beauchamp*, 5 T. B. Monroe, 413, decided in 1827, was an action by an attorney to recover $100 for services in the prosecution of a suit. The contract was to pay the $100, and one half the land in controversy, in case of success, but in case of failure to recover, nothing was to be paid. After a successful termination of the suit, the plaintiff brought this action for the money but not for the land, and the court held that the contract was tainted with champerty, and therefore void.

The case of *Merrit* v. *Lambert*, 10 Paige, 352, was decided by the Chancellor in 1843. Wallace, the solicitor of one of the parties, had entered into an agreement with his client, by which he was to have the rents and profits of certain lots in controversy, for his services, if he succeeded in the defence of the suit. A large amount of rents had come into his hands, and on an application of the client for an order that he pay over such rents, this agreement was holden to be void by the Vice Chancellor. It was appealed to the Chancellor, and in his opinion he lays down the doctrine that one is not permitted "either as attorney or solicitor, or as counsel, to contract with his client previous to the termination of the suit for a part of the demand or subject of litigation, as a compensation for his services," and he cites, in support of this position, 1 Pick. 415; 2 Mart. La. 281; 1 Ham. O. R. 132; 4 Little, 411; 6 Monroe, 389; 5 Paige, 311. The case was removed to the court for the correction of errors,

where the order of the Chancellor was unanimously affirmed. 2 Denio, 607.

In *Thompson* v. *Warren*, 8 B. Monroe, 488, decided in 1848, a contract to prosecute a suit for one half that should be recovered, was held void for champerty.

The case of *Lothrop* v. *Amherst Bank*, 9 Met. 489, was decided in 1845 by the Supreme Court of Massachusetts, in which a contract was held to be void for champerty upon similar grounds. It was also held in that case, that to constitute champerty it was not necessary that the attorney should agree to pay the expenses of the suit when the litigation was upheld by personal services.

See also the case of *Elliott* v. *McClelland*, 17 Ala. R. 206, decided in 1850, where the common law doctrine in regard to champerty was applied to a contract made by an attorney with his client to collect money by suit, and for his services retain 20 per cent. of the moneys collected, or to be paid $200, as he should elect. The plaintiff in that case contended that, if the contract was void for champerty, as to that part relating to the retention of the 20 per cent., yet that it was divisible, and he was entitled to recover the $200, stipulated for his services; but the court held that the contract was entire, and, being tainted with champerty, was wholly void.

In the case of *Wilhite* v. *Roberts*, 4 Dana, 172, it was held that, where the attorney was to receive a sum equal to a certain portion of the thing recovered, in money, but was to have no interest in the thing itself, the contract was not champertous.

These cases and those before cited, with many others, show incontestably that champerty, as defined by the common law, has been generally holden to vitiate all contracts tainted with it See 4 Kent's Com. 6th ed., p. 449, note a. There is one American case, however, in which the common law doctrine of champerty and maintenance is held to be no longer in force, the evils which they were designed to remedy or punish being supposed no longer to exist. I refer to the case of *Bayard* v. *McLane*, 3 Har. 139, which was twice very ably argued by eminent counsel, and received a very elaborate examination upon all the points raised in the case, by Harrington, J. The case presented was that of an attorney contracting to render his services in certain suits and proceedings in consideration that he should receive therefor one third of the proceeds thereof, the other party paying the expenses of the pro-

ceedings. The contract had never been fulfilled on the part of the attorney, and it was determined that, for that reason, it could not be enforced in favor of his representatives, so that it did not become necessary to the decision of the case to determine whether it was void for champerty or not; but the question was made and fully argued, and received the deliberate consideration of the court. Some stress seems to have been laid upon the circumstance that the client, and not the attorney, was to defray the expenses of the prosecution. The judge, in his opinion, says (referring to the English statutes upon the subject), "these statutes of Edward I. seem to have introduced a new feature into the definition of champerty. The evil which they were designed to meet was the conveyance of pretended titles, by those who were unable or unwilling to incur the expense of prosecuting them, to men of wealth and power, who should carry on the prosecution at their own expense, and divide the proceeds. It was a maintenance, not only by influence and power, but by the actual means of conducting the suit, and that on a contract for a part of the thing in action, which by the common law was itself unlawful. Hence, says the statute, "champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs for to have part of the land at variance, or part of the gains." This important ingredient of paying or contributing to the expenses of the suit seems ever since to have been regarded as essential to constitute the offence of champerty, being introduced into all the elementary works of authority as a part of the definition. After citing Blackstone's definition of champerty (4 Bl. Com. 135), he adds: "This is an important matter in reference to the present case. If the payment of expenses be necessary to constitute the offence, that ingredient is wanting in this case," &c.

I do not, however, understand that the decision of the question in that case was made to rest entirely upon the absence of that ingredient, and I think we have shown, not only that it is not expressly introduced into all the elementary works of authority as a part of the definition, but that, if it were, an attorney "contributes to the expenses of the suit," who renders his services therein as such, and thus relieves his client from their payment in money.

It seems to have been assumed by the court, in the case of *Bayard* v. *McLane*, that unless the undertaking on the

part of the attorney to prosecute the suit was unlawful on the ground of maintenance, the agreement to divide the thing in dispute cannot be champertous. The judge delivering the opinion says the "gist of the offence was maintenance, the unlawful meddling with another's suit, which was supposed to suppress justice and truth, or at least to work delay; the bargain to do this for a part of the thing in suit was unlawful, and an aggravation of the offence, because of its violation of another rule of the common law, that *pendente lite nihil innovatur*, which I understand as meaning, not only that, pending the suit, there should be no introduction of new parties or new interests, but as embracing the substance of the old doctrine that choses in action are not assignable," &c. It is certainly true, that the evil does not rest on the undertaking of the attorney to prosecute the suit, for that is in itself a lawful and proper undertaking, and has never been regarded otherwise; nor can it rest in the mere undertaking to purchase a portion of the land or other thing in dispute, for since the statute of 1846, (R. S. p. 263, § 7,) lands held adversely may be conveyed by the owner; and choses in action are now everywhere transferable. The conclusion, therefore, that a contract of this kind cannot be champertous, appears very plausible, and seems to have been regarded by the court, in the case under review, as unanswerable. But the unsoundness of this proposition may be shown by applying the same course of reasoning to simple maintenance at common law. It was lawful for all persons having legal rights, to prosecute suits against those by whom such rights were withheld; and it was lawful, also, for any person having any interest in the subject of the suit, whether absolute or contingent, or standing in the relation of father, guardian, or son, &c., to aid in its prosecution; but if a stranger intermeddled to aid in its prosecution, though in a *lawful suit*, his act became *unlawful* maintenance. Upon this distinction of relationship to the party or to the suit depended the character of the act done, and upon this it was determined whether the act was lawful or unlawful. So a person who was a habitual promoter of lawsuits was adjudged a common barrator, and it made no difference whether the litigation set on foot by him were just or unjust in its character. If the suits instigated by him were lawful suits, how, it may be asked, can he be guilty of an offence worthy of punishment for promoting what is lawful in itself? In all these cases the offence really consists in

the injurious tendency of the acts done, in view of the character or relation in which the parties stand to each other, as being calculated to promote contention and strife, and encourage useless or unnecessary litigation. This, it seems to me, constitutes the gist of the offence, and is what renders the act of maintaining unlawful. An attorney may purchase property from a stranger, or any disposable interest in property, or receive a gift; but Lord Thurlow remarks, in *Willes* v. *Middleton*, 1 Cox, Ch. 112, "it is perfectly well known that an attorney cannot take a gift while the client is in his hands, nor instead of his bill. And there would be no bounds to the crushing influence of the power of an attorney who has the affairs of a man in his hands, if it were not so; but once extricate him, and it may be otherwise."

It is said that the law against maintenance and champerty originated in a state of society, and was designed to remedy evils, which no longer exist in England or in this country; that they had their origin in great social and political inequalities; in the feeble, partial and corrupt administration of justice, and in the influence of powerful individuals corrupting and overawing judicial tribunals, and making them instruments of great injustice. In the opinion of the court for the correction of errors, in the case of *Thalhimer* v. *Brinkerhoff*, 3 Cowen, 643, it is also said that "champerty, maintenance, and barratry were defined as offences in very early stages of the English law. These practices seem to have been then common in England, and they were denounced, not only as sins very heinous in themselves, and highly injurious to the peace of society, but as offences which actually interrupted the course of public justice. The excitement of suits is an evil when suits are unjust; but, when right is withheld, and the object of a suit is just, to promote the suit is to promote justice." "When the administration of justice is firm, pure, and equal to all, and when the laws give adequate redress for groundless suits, it is not easy to conceive that mischief can arise from opening the courts of justice to all suitors, or from contracts by which the fruits of a suit may be divided between him who has the right of action, and him who contributes advice, expense, or exertion, to institute the suit, or prosecute it to effect."

It is true that some of the reasons of the law against maintenance and champerty have passed away, and that the law has been modified by exceptions and constructions

in accordance with the altered condition of the social state, and that now they are comparatively little felt as evils. There can now scarcely be a motive, in this country, for a stranger to aid in the prosecution of a suit without any chance of pecuniary benefit to himself, unless it be one of charity to an individual, or of public benevolence, in which case the act would be lawful; and for this reason unlawful maintenance but very rarely occurs in its simple form. But champerty presents a strong temptation to engage in it, that of pecuniary profit, one that has a charm which captivates the man of intellect, and learning, and genius, as well as the man stupid and unlearned, and one which unfortunately presents stronger inducements to those of the legal profession than to any others, because they are better qualified to calculate the chances of success, and they can prosecute suits at less actual expense, and consequently hazard less in the chances of a litigation. Comparatively few of that profession have all the business that they have time to attend to; and if one devote time, which would not otherwise be actually occupied, to the prosecution of a doubtful claim, the client paying the ordinary expenses, and he fails to succeed, he is not the poorer for his exertions; whereas, if he succeeds, he is paid not only for his services, but for the risk of their loss. He has a strong temptation, too, with the chance of such a bargain before him, to deceive his client, and to represent a title or claim as doubtful or difficult to be established, when he believes it to be clear and easily established.

These are some of the motives which are presented to the attorney if such bargains are held to be lawful; and to these may be added a strong temptation to interest himself with others in searching for cases where, by some oversight in the form of conveying, or by some mistake, one man has a legal advantage by which he can oppress another, making known such advantage to the person who holds it, and encouraging him to avail himself of it by the offer of a division of the proceeds as a compensation for enforcing it.

To other parties it holds out a strong inducement to prosecute doubtful and unjust claims. Many a man, with abundant means, would not be willing to prosecute a suit with the chance of paying all the costs on both sides in case of failure, who, if his attorney should offer to take a portion of that risk for an interest in the chances of success, would no longer hesitate to sue. Instances might be multiplied to show that the legalizing of such contracts would

tend to promote useless and unjust litigation, and have a demoralizing influence both upon the profession and the public.

Attorneys, solicitors, and counsellors are sworn officers of the courts, appointed to aid the courts in which they are employed, in the administration of impartial justice; and not only the character with which they are thus invested, but the positive law of this State require that they shall not be guilty of any deceit or collusion, nor consent to any deceit or collusion with intent to deceive the court or any party; and the statute makes a violation of this duty a misdemeanor punishable by fine and imprisonment, and subjects the guilty party to a civil action and treble damages for the injury.

They are not allowed to buy, or be in any manner interested in buying, any bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent, and for the purpose of bringing any suit thereon, nor can they lend or advance any money, &c., as an inducement to the placing, or in consideration of having placed in the hands of such attorney, solicitor or counsellor, or in the hands of any other person, any debt, demand, or thing in action, for collection, upon pain of fine, or imprisonment, or both, in the discretion of the court. R. S., pp. 424, 425, §§ 37, 40, 41, 42.

Can it be less an offence for an attorney to purchase land with the avowed object of prosecuting a suit for its recovery?

Attorneys are the persons to whom clients must apply to prosecute or defend their suits, and to transact much of their most important business, and courts of law and of equity will guard this confidential relation with jealous care, that no advantage be taken by persons in that relation. And judgments, bonds, and other securities given by a client to his attorney or solicitor on account of services rendered or money advanced, will be set aside, or allowed to stand only as security for what is justly and fairly due from the client, though not tainted with champerty. 1 Cox, 112; 2 Vesey, jr. 199; 9 J. R. 253.

It is proper, in closing this opinion, to say that, in this discussion, while we have endeavored to explain and illustrate a principle by showing what evil consequences may, and would naturally result from discarding the doctrine of champerty, we have intended no censure upon the attorney who is plaintiff in this suit. It may have been, and proba-

bly was, a mode of payment proposed by the defendant for his own convenience, and, fair and just in itself as between the parties, entered into by the attorney without reflecting upon the policy of such contracts in general.

Finally, upon principle as well as authority, we are compelled to hold the agreement declared upon and established by the proof in this case, void on the ground of champerty, and to reverse the judgment of the Circuit Court therein.

Harbaugh, for plaintiff.

Walkers and *Russell*, contra.

Municipal Court of Boston. January Term, 1857.

COMMONWEALTH *v.* BROWN.

The St. of 1855, c. 448, giving Police Courts concurrent jurisdiction with the Municipal Court of Boston and the Court of Common Pleas, of "all larcenies," when the property shall not be alleged to exceed the value of fifty dollars, must be construed to extend to simple larcenies only.

It *seems*, that if this statute should be construed to extend to aggravated larcenies, punishable by imprisonment in the State prison, it would be unconstitutional as infringing the twelfth article of the Bill of Rights, which prohibits the legislature from passing any law to subject any person to an infamous punishment without trial by jury.

THE statute of 1855, ch. 448, provides, that the several Police Courts of this Commonwealth shall have concurrent jurisdiction with the Municipal Court of the city of Boston and the Court of Common Pleas, of all larcenies, when the money or other property stolen shall not be alleged to exceed the value of fifty dollars, and that the punishment may be such as is authorized by existing laws.

Questions as to the construction of this act and its constitutionality were soon raised. The Judges of the Police Court of Boston decided that the statute, by its terms, included larcenies of the aggravated sort, and that the act was constitutional, and sentences of imprisonment in the State prison were passed by some of the Police Courts for offences under the act. Both points were decided the other way by the Municipal Court of Boston. We give both of these opinions below; since they were pronounced, a case involving the same points has been brought before the Supreme Court, by writ of error, in favor of a prisoner

sentenced by the Police Court of Boston, — and he was discharged. The decision is understood to have proceeded on the ground that the act, by its terms, did include aggravated larcenies, and that it was unconstitutional; thus affirming one position of each of the inferior courts.

We are informed that a statement which has been made to the effect that the act was introduced by, or at the suggestion of one of the present Justices of the Municipal Court, is incorrect.

The opinion of the whole court was delivered by

Huntington, J. — The legislature of 1855 passed a statute extending the jurisdiction of police courts in cases of larceny where the amount of property stolen was not alleged to exceed fifty dollars in value, and giving the same power of punishment that belongs to the Court of Common Pleas and the Municipal Court. The Police Court for the city of Boston under its interpretation of this act, claimed to exercise final jurisdiction in cases of aggravated larceny, such as stealing from the person and buildings, and imposed punishment to an extent not authorized by previous statutes, as for the aggravated offence. Appeals were taken to this court, and motions made to discharge the accused, which required us to give our construction of the act.

After examination and deliberation, the result was a denial of the jurisdiction exercised by the Police Court. The first section of the act of 1855, c. 448, provides, that "the several Police Courts of this Commonwealth shall have concurrent jurisdiction with the Municipal Court of the city of Boston, and the Court of Common Pleas, of all larcenies, when the money or other property stolen shall not be alleged to exceed the value of fifty dollars; in all which cases the punishment imposed may be such as the Court of Common Pleas and Municipal Court are authorized to inflict by existing laws."

The second section gives the same tribunals jurisdiction in cases of assault and battery, *not felonious*, occurring within their jurisdiction, with like power of punishment; and the third section makes it optional with Police Courts to take final jurisdiction, and gives the right of appeal.

The offences of stealing in a building at a fire, and from the person, are known to the law, not as simple larcenies, but as aggravated, compound, or mixed, and it will be noted, that if Police Courts can exercise final jurisdiction in such cases, they may sentence offenders found guilty to imprisonment in the State prison for five years, a punish-

ment as severe as may be imposed for breaking and entering a building in the day time, with intent to commit the crime of murder, no person being put in fear.

In some instances upon appeal, the proceedings were quashed, and the accused escaped. In others, sentences and punishment were submitted to and inflicted. This course continuing from term to term, and a perpetual conflict of jurisdiction, tending to disturb the harmony of judicial proceedings, the Justices of the Municipal Court have revised their previous conclusions, and after much and repeated consideration feel bound to adhere to their former decisions, and to deny the final jurisdiction claimed for the Police Court under the statute of 1855.

The offence of stealing in a building is punished by imprisonment in the State prison not more than five years, or by fine or imprisonment in the house of correction or county jail, not exceeding limited amounts and times.

Stealing at a fire or in a building on fire, or from the person, are also punishable in the State prison, as well as by fine, or the house of correction or jail.

Simple larcenies may be punished by imprisonment in the State prison, not exceeding one year, or in the jail, or by fine, but sentences to the State prison under former statutes, could only be imposed by the Court of Common Pleas or the Municipal Court, not by Police Courts.

The Municipal Court and Court of Common Pleas having the power to sentence to the State prison, both in cases of aggravated and simple larceny, and the act of 1855, declaring that in all cases of larceny where the property stolen is not alleged to exceed fifty dollars in value, the punishment imposed by the Police Courts may be such as the Court of Common Pleas and the Municipal Court may inflict under existing laws, it is manifest that the act in substance and legal effect empowers these courts without juries to commit and sentence offenders to the State prison.

We think a statute containing such provisions is unconstitutional and void, and that a recurrence to a few familiar and well-established principles will place this beyond controversy.

The constitution of Massachusetts pronounces the right of trial by jury "*sacred.*" It declares that no subject shall be deprived of his liberty but "by the judgment of his peers or the law of the land." To cut off all pretext for infringing upon the liberty of the citizen, under the general terms "law of the land," it is immediately provided that "the

legislature shall not make any law that shall subject a person to infamous punishment without trial by jury." Declaration of Rights, Art. 12. The government of the army and the navy are the only exceptions.

Larceny has always been known as a felony. Any crime punishable by death or imprisonment in the State prison, is felony by stat. 1852, ch. 37, and no argument can be necessary to show that punishment in the State prison or for felony is infamous, so long as felony is universally treated as an infamous crime.

The constitution does not require that the *crime* should be infamous to secure the right of trial by jury, but merely the punishment. In the cases of larceny from a building, or the person, or at a fire, both the crime and the punishment are infamous.

The Constitution of the United States is not silent as to these safeguards.

Art. V. of the amendments provides that no person shall be held to answer for a capital or otherwise *infamous* crime, unless on a presentment or indictment by a grand jury, with certain exceptions not material to the present inquiry; and the sixth article declares, that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury.

It might be contended, that this exemption from answering over extends even to a preliminary examination, on complaint and warrant in the case of infamous crimes. But without adopting or fostering such an interpretation, and taking the language in the most restricted sense that can be demanded — as applying only to answering or pleading finally — as that trial which is followed by the power and right of sentencing — we are at a loss to perceive how the constitutionality of the statute in question can be sustained. It subjects a person to the infamous punishment of the State prison for an infamous crime, by a Police Court, without presentment by a grand jury, and without any trial by a traverse jury.

It is suggested that the statute secures the right of appeal. There is more than one answer to this. It is sufficient to say, that the right of appeal is not what the constitution has pledged to him. It is the right of having the charge investigated by a grand jury of his peers. This the mere right of appeal cannot give. This the statute of 1855 takes away.

If the constitutionality of the law can be supported be-

cause it gives an appeal, on the same principle a statute extending the jurisdiction of a Police Court with the right of appeal, in cases of arson, rape, and any other offence however heinous, may be sustained. The right of appeal in some instances, would be the mere right of imprisonment for a long period, and the loss of a speedy and public trial, unless good and sufficient sureties could be obtained.

Inasmuch as every appellant in criminal proceedings is bound to recognize in such amount, and with such sureties as the justice whose sentence is appealed from shall require, both for appearance and abiding sentence, and in the mean time keeping the peace and being of good behavior, it is obvious that before a person convicted by the Police Court, under the act of 1855, can avail himself of a trial by jury, he must comply with certain burdensome and perhaps impossible conditions not imposed by the constitution, or be deprived of his liberty. The act says to him, you must submit to a sentence to the State prison by a Justice of a Police Court, and lose the right to trial by jury, unless you find sufficient sureties for appearance and keeping the peace, or be imprisoned. The bill of rights does not say this. We cannot adopt a principle which requires the interpolation of this condition in the constitution. Prescribing such a condition may be a denial of the right of a trial by jury. A person presumed innocent of crime until found guilty by his peers, is punished for his poverty or want of friends, and branded with guilt by a sentence that consigns him to legal infamy before trial by jury. The reasoning of the court in *Green* v. *Briggs*, 1 Curtis, C. C. R. 311, is not without its application to this point; and we do not forget that courts and judges have sometimes held that the right of appeal satisfies the requirements of the constitution.

In *Fisher* v. *McGirr*, 1 Gray, 33, the Supreme Court admonish us often to recur to these familiar maxims of constitutional law, "which scarcely require citation." The seizure clause in the act of 1852, forbidding the sale of intoxicating drinks, was deemed obnoxious because it gave justices of the peace jurisdiction to adjudicate upon an unlimited amount of property.

The act of 1855 vests quite as "extraordinary and unusual powers" in Police Court Justices, by permitting them to adjudicate upon a large, if not an unlimited amount of liberty. The same case declares that the probability that magistrates and courts will act in conformity with familiar

maxims governing the administration of justice, is not to influence courts in construing the constitutionality of an act, but the terms and provisions of the act itself. p. 39. There are many other suggestions and positions in the opinion of Chief Justice Shaw in that case, which are instructive, and to be borne in mind in the present inquiry.

As bearing upon the true interpretation of the clause in our bill of rights already cited, in addition to the article from the Constitution of the United States, we cite the sixth provision of the amendments proposed to the Constitution of the United States by the people of Massachusetts, in their convention held to determine whether they would adopt that constitution. It was introduced "to remove the fears and quiet the apprehensions of many of the good people of this Commonwealth." It reads thus:

"Sixthly, that no person shall be tried for any crime, by which he may incur an infamous punishment or loss of life, until he be first indicted by a grand jury," excepting only cases arising in governing the land and naval forces. Though it has been decided that the provisions in the Constitution of the United States are to be treated as restrictive only upon laws to be enacted by the Federal Government, and not those passed by the States in their separate capacity, there can be no doubt from the above citation what interpretation is to be given to the bill of rights of Massachusetts. This resolution also recognizes the principle that there are other punishments infamous besides loss of life, and that it was well settled at that time. Neither did the people of Massachusetts require a statute defining felonies, to inform them that imprisonment in the State prison is an infamous punishment.

Without enlarging further on this ground of denial of jurisdiction, in Police Courts, under the first section of the act of 1855, it is sufficient to say that we deem it unconstitutional, and that we reach this conclusion, not unmindful of the strong presumption that all acts of a regularly constituted legislature are constitutional; that they are not to be set aside except in doubtful cases, and that there is a higher tribunal whose peculiar function it is to pass upon questions of this grave character.

We have therefore considered whether, though the act in question may be unconstitutional, it is imperatively necessary for us so to decide in the cases before us. These cases are complaints for aggravated, and not simple larcenies. If the words "all larcenies," used in the act, are

general, indefinite, or susceptible of two constructions, so that they may be construed as applying only to simple and not complex, compound, or aggravated larceny, the jurisdiction of the Police Court may be denied, as not within its terms and intent, and this would be equally fatal to the complaints. We think there are established rules of interpretation, and sufficient reasons why these words should be read as applying to mere larcenies, and not to stealing at a fire, or in buildings, or from the person.

It is not clear and palpable that all stealing, or all larcenies of property of a certain value, necessarily includes stealing in buildings, or from the person, any more than that when we speak of all pilferers or thieves, we must be understood either in a legal or popular sense, as embracing all pickpockets.

It will be instructive for us to look at former statutes, touching this distinction between mere larceny and larceny aggravated, and as to the meaning to be attached to the words "all larcenies."

If we turn to the 143d chapter of the old statutes of 1804, we find in section 2 a provision, that the Supreme Judicial Court, the Courts of Common Pleas and the Municipal Court, shall have concurrent jurisdiction of "*all larcenies*," where the goods or articles stolen shall not be alleged to exceed in value $100, and every justice of the peace shall have concurrent jurisdiction with said courts of "all larcenies," where the alleged value does not exceed $5.00. Yet this language, which on comparison will be found precisely, in legal import, like the statute of 1855, did not give jurisdiction in cases of aggravated larcenies.

Larcenies in a building, or from the person, were treated as offences of a different description. We find that by the sixth and eighth sections of the same chapter, the Supreme Court alone had jurisdiction of this class of offences. Then, as now, these aggravated offences did not depend on the alleged value of the articles stolen. The offence is not constituted or defined by the amount of property stolen, but the place from which it is taken. The inference is fair then, that when the legislature speak of larcenies of property of specified value, they contemplate simple larceny only. In aggravated larcenies, value is no essential element.

We are well aware that at common law, aggravated larceny, or from the house, or person, was not distinguished from simple larceny, either as to the circumstances neces-

sary to constitute the offence or as to the punishment, but legislation in England at an early day, and in Massachusetts since, has recognized such a distinction in both respects, but more signally in the degree of punishment inflicted. We do not contend that they are essentially distinct crimes. Hawkins' definition of "larceny" is, that it is an offence against the goods of another from "*latrocinium.*" The words "many" or "all," if prefixed, would not necessarily change the character of the offence. He gives separate chapters to the consideration of simple, mixed, grand, and petit, and says that mixed or complicated larceny is such as hath a farther degree of guilt in it, as being a taking from the person of a man, or from his house. 1 Hawkins, P. C. 207.

Robbery is stealing from the person, with the addition of violence or putting in fear. *Commonwealth* v. *Clifford*, 8 Cush. 215. Yet it would not be contended that the statute under consideration extended to stealing from the person by violence or robbery.

Simple larceny is distinguished by the law from mixed or compound larceny, which includes the aggravation of taking from the house or person. 1 Gabb. Cr. Law, 524.

When the word larceny therefore may fulfil its meaning, or the words "all larcenies of property of a certain value" may fulfil theirs, without construing them as if the words stealing from a dwelling-house, building, or the person, were inserted, why should a construction be adopted which compels their insertion? Is it not larcenies of property of certain value merely, and not larcenies at certain places, that the legislature must be supposed to have had in contemplation?

In *State* v. *Anderson*, 2 Overton, 6, in an indictment alleging an assault and battery with intent to kill, it is held that there is a strongly marked distinction between such an offence and a simple assault and battery, recognized by numerous authorities; that this distinction is marked by assigning different degrees of punishment, and that an assault and battery with intent to chastise only, must be different from the same act proceeding from an attempt to kill.

So by parity of reasoning it would seem that the mere larceny of an article dropped in the highway, must be considered an offence so different in character from larceny of the same article from the person, or in a building, or at a fire, where property is peculiarly exposed to depredation,

that the language "all larcenies" of property to a fixed amount, does not, *ex in termini*, imply such larcenies as derive their qualities, not from value, but aggravating circumstances of place; which embrace not only stealing, or a trespass as to the article itself, but another and distinct trespass upon buildings or the person.

The provisions of the second section of the act under discussion deserve attention in this connection. The legislature there expressly enact, while enlarging the jurisdiction of Police Courts in assaults and batteries, that they shall not have final jurisdiction in cases of felonious assaults.

Felonies being crimes punishable in the State prison, this restriction is pregnant with conclusions as to the intent of the legislature in the first section. That it should have been intended to confer upon Police Courts the power to sentence to the State prison in cases of aggravated larceny, and to withhold it in aggravated assaults and batteries, by two consecutive sections of the same act, is not to be presumed, when another construction may be adopted that does not lead to such a result, and which does no violence to language.

Reference to the provisions of the Revised Statutes, ch. 126, and of the statutes since passed relating to larcenies, leads to the same conclusion. The aggravated larcenies not depending on values are made the subject of separate sections and classification. Sections 14, 15, 16. Section 17th provides for larcenies in which value is made an element — not locality.

Without enumerating provisions contained in other statutes, it is sufficient to refer to them, where it will be seen, that this distinction between mere larcenies and those of aggravated character is definitely marked and recognized. Stat. 1851, c. 156, and c. 151; 1852, c. 4; 1849, c. 132; 1852, c. 4.

It may be suggested that the 18th section of c. 126, Revised Statutes, in extending the jurisdiction of justices of the peace to "all other larcenies *whatever*," when the property alleged to be stolen is not alleged to exceed $5.00 in value, intended to include aggravated larcenies. Such seems to have been the view of the commissioners of revision. But there the language was preceded by a provision as to simple larcenies, and it was used in contradistinction to that enumeration in the prior section, and it was enforced by the additional intensity given by the word "whatever." But the provision itself was repealed by the

4th section of ch. 156 of the statutes of 1851, as to stealing in a building, by making the punishment imprisonment in the State prison, fine, or imprisonment, insomuch that one of the first acts of the next General Court, 1852, ch. 4, was to "modify" the provisions of this 4th section as to aggravated larcenies, so as to restore what had been taken away, and give Police Courts and justices of the peace jurisdiction, where the property stolen in a building does not exceed in value $10, with a restriction, however, as to punishment, to fine or the house of correction. The passage of this act — referring to the act of the previous year — silent as to the provisions of the 18th section of the Revised Statutes, touching jurisdiction in aggravated larceny — somewhat implies also, that the power of sentencing to the State prison is inconsistent with the exercise of final jurisdiction by a Police Court or justice of the peace.

If the statute of 1855 embraces larcenies in buildings, it must operate as a repeal of this last cited statute of 1852, c. 4, without an enactment to that effect. Repeals by implication are never favored, and where one of two constructions may be given, that which does not work a repeal of an act by implication will be adopted. This is a rule of construction too familiar to be fortified by citations. Another often repeated maxim of law is, that nothing is to be presumed in favor of the criminal jurisdiction of an inferior court, or of the extension of its jurisdiction, when its powers are conferred and limited by particular statutes.

Two wholesome rules of interpretation are laid down by Justice Gould, in Palmer's case, 1 Leach, 391. First, if any part of an act is penned obscurely, and other passages in the same act will elucidate that obscurity, recourse ought to be had to such context. Secondly, if there are several acts upon the same subject, they are to be taken together as forming one system, and as interpreting and enforcing each other. Accordingly, it was held that the words "*any* paper liable to certain duties," were not to be taken in a large and indefinite sense, but restricted to paper prepared for receipts and instruments mentioned in the statute.

These rules may be forcibly applied in the examination of the statutes of the Commonwealth already cited. A further reference to the various acts relating to the criminal jurisdiction of justices of the peace will show, that the policy of our legislation from the beginning has been to require magistrates, who are not attended by juries, to refer

the presentment of all crimes of an aggravated character to grand juries, and their trial and punishment to higher courts, in which the question of guilt is submitted to a jury. Another fact will be noticed. Whenever the legislature has undertaken to give final jurisdiction to Police Courts or justices of the peace in larceny other than simple, it has imposed express and defined limits as to the extent of punishment, and never made it coextensive with the power of the Court of Common Pleas or Municipal Court. If aggravated larcenies are embraced in the language of the act of 1855, it confers upon Police Courts the power both of fine *and* imprisonment, since stealing at a fire may be thus punished. In what other statute bestowing final jurisdiction upon Police Courts can such a power be found?

The result then of our investigation and consideration is, that although the statute must be deemed unconstitutional, yet it is not required of us to put our decision upon that ground, and that the denial of final jurisdiction to Police Courts under the first section of the act of 1855, in cases of aggravated or compound larceny can be sustained, upon the language of the statute itself, of previous statutes, and by well known rules of interpretation, those cases not being necessarily embraced in its terms.

Police Court of Boston. December, 1856.

COMMONWEALTH *v.* MEHEGAN.

The St. of 1855, c. 418, confers jurisdiction of aggravated as well as simple larcenies upon Police Courts, and is constitutional.

ROGERS, C. J. — This was a complaint for larceny of a silver watch of the value of fifteen dollars, the property of Charles McCourt, in his dwelling-house, the value of the property stolen thus being alleged to exceed ten dollars, the amount to which jurisdiction is given to this court by ch. 4 of the laws of 1852, and being alleged not to exceed the sum of fifty dollars, the value specified in ch. 448 of the laws of 1855, as the limit of jurisdiction. The question in this case is whether this court has full jurisdiction, and ought therefore (unless some special reason exists for availing ourselves of the provision in the 3d section of the act of 1855) to proceed to sentence; or whether the court has only primary jurisdiction to examine the case, and

must recognize the defendant to appear at the Municipal Court. This depends upon the meaning of the first section of ch. 448 of the laws of 1855.

It is our duty to exercise all the jurisdiction which the law gives us. Such is the intent and expectation of the legislature, in increasing the jurisdiction of a court. If they decide that such a change will be beneficial, it only remains for the court to give to every one the benefit intended for him. The benefit intended in this act for the defendant, is a more speedy trial; a great benefit, if he is innocent, and sometimes if he is not, especially where he is punished by fine. The benefit intended for the public is the diminution of expense and the more speedy administration of justice. The constitution gives the defendant a right to justice "promptly and without delay," "according to the laws." He has a right, therefore, to have his case decided by the first court having jurisdiction, before whom it may come; and a court refusing to exercise such jurisdiction, where it does not seem doubtful, does a wrong to him and the public.

[His Honor here stated the provisions of the statute.]

The words are "*all larcenies.*" There is no limitation in the words themselves. It is a simple phrase with an apparently plain meaning. There seems to be no room for construction. It would be difficult to show by any construction, that "*all*" means "*some*," or "*less than all.*" And even if it could be shown that it was limited to some larcenies, there is nothing on the face of it referring to one kind more than another of those mentioned in previous statutes; the enumerated or not enumerated in the 17th section of the 126th chapter of the Rev. Sts., or the simple or aggravated, real or personal, mentioned in other laws. We understand it in the more obvious sense, as including all these. But a different opinion exists, which is entitled to the greatest respect, that the words "all larcenies" mean only simple larcenies.

It has been suggested that a comparison of the act of 1855 with previous legislation, would strengthen this interpretation, and would show some reasons why the phrase "all larcenies" in that act should be construed to mean simple larcenies only. We will therefore examine the Revised Statutes, which contain the earliest law now in force on the subject, the acts and course of legislation between the Revised Statutes and the act of 1855, and the classification of larcenies with regard to jurisdiction existing at the time of passing that act.

We will turn first to the acts concerning aggravated larcenies. By the act of 1843, c. 1, *all larcenies in dwelling houses by night* were made punishable by imprisonment in the State prison or house of correction not exceeding five years, or by fine not exceeding three hundred dollars and imprisonment in the jail not exceeding two years.

By the act of 1845, c. 28, larceny by night in any office, bank, warehouse, shop or vessel, was made punishable in the same manner.

By the act of 1851, c. 156, larceny in any building by day or night was made punishable by imprisonment in the State prison not more than five years, or in the house of correction or jail, not exceeding three years, or by fine not exceeding five hundred dollars.

By the act of 1852, c. 4, jurisdiction is given to Police Courts of "larcenies in buildings," where the money or property stolen shall not exceed the sum of ten dollars.

Concerning this last act it is argued, that if the legislature had not been in 1852 opposed to the policy of enlarging the jurisdiction of Police Courts in cases of aggravated larceny, why did they limit the enlargement of power to the single case of larceny in a building? It is known to the justices of this court that the act of 1852 was passed to remove doubts respecting the acts which concern larceny in buildings. The necessity was to provide for a continuance of a jurisdiction, which some supposed to be affected by those acts, and the doubts to be removed of course only concerned larceny in buildings. This is the reason why the act went no further. But the legislature thought fit also to increase the jurisdiction as to the value of the articles stolen.

The legislation respecting simple larcenies is contained in three acts.

By the act of 1849, c. 132, it was provided, that Police Courts shall have jurisdiction of the larcenies mentioned in the 17th section, c. 126, Rev. Sts., where the money or other property shall not be alleged to exceed the value of twenty-five dollars.

By the act of 1850, c. 303, "beasts and birds, ordinarily kept in confinement," &c., were made subjects of larceny.

By the act of 1851, c. 151, larcenies of real estate were created, and were to be simple or aggravated, and the same courts and justices were to have jurisdiction, as when the article stolen was personal property.

We notice in this legislation nothing tending to show

that "all larcenies" in the act of 1855 is limited to simple larcenies; but we perceive two things which have a tendency to an opposite conclusion. The first is, that in the course of this legislation there is an increase of the jurisdiction in both *simple* and *aggravated* larcenies. It seems that such is the tendency of the legislation since the Revised Satutes, and that the act of 1855 is only a further instance of the carrying out of this tendency both in larcenies and assaults.

What we secondly notice is, that whenever the word "*larceny*" alone is used in the statute, it is used to include both *simple* and *aggravated* larceny. Thus in the Rev. Sts., c. 126, section 9: "Every person, who shall break and enter any dwelling house in the night with intent to commit '*larceny.*' Section 11, every person, who shall break and enter in the night, any office, &c., with intent to commit *larceny.* Section 12, every person, who shall enter in the night time without breaking, &c., with intent to commit *larceny.* Section 13, every person, who shall enter, &c., with intent to commit *larceny.* Section 19, every person, who shall be convicted upon indictment either of the crime of *larceny,*" &c., or shall be convicted at the same term of court, either as principal or accessory before the fact in three *distinct larcenies.* Section 23, "Every Police Court and every Justice of the Peace shall have jurisdiction, &c., of all offences of buying and receiving, &c., in all cases, in which they would have jurisdiction of *the larceny* of the same goods, &c. Section 25, the officer who shall arrest any person, charged as principal or accessory, in any robbery or *larceny,* shall secure the property, &c. Section 26, upon any conviction of burglary, robbery or *larceny,* &c., the court may order a meet recompense to the prosecutor." So in the act of 1843, c. 1, section 2, whenever "the offence of *larceny* is alleged to have been committed on any particular day, it shall be deemed and taken to have been committed in the day time, unless," &c. So in the act of 1851, c. 156, in each of the first three sections concerning breaking and entering, or entering any building "with intent to commit the crime of *larceny.*" And in the act of 1850, c. 303, the taking without consent, &c., of any beast or bird, ordinarily kept in confinement and not being the subject of larceny at common law, shall be held to be *larceny,* and shall be punished in the manner provided in the Revised Statutes for the punishment of persons guilty of the crime of larceny.

In burglary, and breaking and entering buildings, the intent must be to commit a felony in the dwelling-house or other building. 1 Hale, P. C. 560; 2 East, P. C. 514; 1 Russ. on Crimes, 824. But a larceny in a dwelling-house or other building is an aggravated larceny, and the word "larceny," in each of the seven sections concerning burglary and breaking and entering, must therefore include aggravated larceny. If "larceny" in these sections were limited to simple larceny, then the intent in breaking and entering the dwelling-house, or other building, must be to commit a larceny out of it.

And is there any doubt, that a person convicted of three aggravated larcenies may be sentenced as a common thief; or that, when the larceny is aggravated, the statute requires the officer to keep the property; or that an indictment, not alleging an aggravated larceny to be by night, charges it to be by day; or that stealing a bird from a cage in a house is larceny in a building; yet none of these things would be so if the word "larceny" in the statutes concerning them is limited to simple larceny.

So in the statutes *aggravated* larceny is expressed either by calling it such, as in the act of 1851, c. 151; or describing the aggravation, as in Revised Statutes, c. 126, sections 14, 15, 16, in the act of 1843, c. 1, section 1, in the act of 1845, c. 28, and in the act of 1851, c. 156, section 4.

And when *simple* larceny is meant, the word "larceny" is not in a single instance, which we have seen, used *alone*. In the Rev. Sts., c. 126, the aggravated larcenies are first described, stating the particular aggravation; then simple larcenies are described in section 17th, so that the omission of the aggravation indicates that they are simple; the aggravation being dropped in the same way as in arson, where the aggravation in the first section of a "person being within the dwelling-house" is dropped in the second section. In the 18th section they are further distinguished from aggravated larcenies, by styling the latter "other larcenies."

In the other cases the word "simple" is used. Thus in the Rev. Sts., c. 126, section 21. "Upon a first conviction," &c., when the act of stealing the property was a "*simple* larceny." In section 29, if any officer, agent, shall, &c., he shall be deemed by so doing to have committed the offence of *simple* larceny. Precisely the same words "simple larceny" are repeated in sections 30 and 31, in the same manner. So in the act of 1851, c. 151,

section 1, it is provided that the offender "shall be guilty of such *simple* or *aggravated* larceny, as he would be guilty of, if such property were personal property."

So also in the "act for consolidating the law of England relative to larceny," 7 and 8 Geo. 4, c. 29, section 3, the phrase is, "every person convicted of *simple* larceny," the two classes of simple larceny (grand and petit) being done away. Thus also in Hawk. P. C., where aggravated and simple larcenies are treated in separate chapters, the title, chapter 33, is "Simple Larceny," and succeeding chapters have the titles of particular aggravated larcenies. In East, P. C., where the whole, simple and aggravated, is continued in c. 16, it is entitled "Larceny," and in Gabbit's Crown Law, where the whole is contained in c. 32, its title is "Larceny." But if a chapter in the books was entitled "*all* larcenies," we can scarcely conceive of succeeding chapters containing "other larcenies."

We will now consider shortly, what was the state of the law respecting the jurisdiction of Police Courts in larcenies at the time of passing the act of 1855. Larcenies were at that time divided into four classes with respect to this jurisdiction.

1. Larcenies in vessels by night. Jurisdiction doubtful.
2. Larcenies in vessels by day. Larcenies at fires. Larcenies from the person. Jurisdiction up to five dollars.
3. Larcenies in buildings by day or night. Jurisdiction to ten dollars.
4. Simple larcenies. Jurisdiction to twenty-five dollars.

Here the classification is unnecessarily complicated, and is not regulated by the degrees of aggravation, that is, by the mischief of the offence. Why is a larceny in a vessel by night, or in a vessel by day, a higher offence than in a dwelling-house by day or night? Why should the jurisdiction of larcenies in a vessel by night remain doubtful, when it was thought necessary to pass a statute to remove the doubts respecting larcenies in buildings by night; and why are the latter classed with the highest kind of larceny, — that is, larceny from the person. To follow details no further, we see already, that the classification here is not such as it was desirable to perpetuate in the law. And is it anything improbable, that the legislature should have provided a remedy in the act of 1855, by applying one simple provision to the whole? Where the evil was complication, the remedy would naturally be simplification. It is true that the remedy took away the distinction in

jurisdiction between simple and aggravated larcenies; but the next section of the same act shows that this was intended, for there the legislature did the same thing with respect to assaults.

[His Honor here showed by a review of the statutes on the subject of assaults, that the distinction between simple and aggravated assaults had been abolished, and jurisdiction of all such offences been given to Police Courts. He also considered the objection that there was no express repeal of the law of 1852 which limited the jurisdiction to the alleged value of ten dollars, and showed that similar repeals had been often made without express words. And also the objection that a large discretion in respect to punishment was vested in the Police Court, which he considered to be no defect in the law, but rather a proof of its wisdom.]

An objection from the constitution is also made. The constitution declares that the legislature shall not make any law that shall subject any person to capital or infamous punishment, except for the government of the army or navy, without trial by jury. This objection is generally supposed to be answered with respect to offences within the jurisdiction of Justices' or Police Courts by showing that the defendant may have this trial by jury, on appeal; and if this argument is good in larcenies, where the property stolen amounts to ten, fifteen, or twenty-five dollars, why not when it amounts to fifty dollars; and why may not the trial by jury be on an appeal in one case as well as the other? If the defendant can have a trial by jury if he pleases, there is nothing, according to the received opinion, to prevent his being sentenced to an infamous punishment. He is not bound to be tried at all, unless he pleases; he may plead guilty. A trial is secured to him, when he pleases to be tried. He was not before bound to be tried by a jury, unless he pleased; it is sufficient now that he can be tried by jury, if he pleases. In the case of *Hall* v. *Mountfort*, 1 Mass. 452, it is said, "The constitution has not undertaken to detail or even to specify *the mode* in which parties are to have a trial by jury, — that also is left to the legislature." The constitution was meant to secure a right. By this construction the defendant has that right, and right to another trial besides. The constitution intended to prevent a hardship; but instead of a hardship, he has an advantage, — two chances of acquittal.

But we do not rely upon this reasoning alone. We think that to support the opposite argument it ought to be shown not merely that imprisonment in the State Prison for felony is an infamous punishment, but that imprisonment in the House of Correction for felony is not an infamous punishment; for if the latter is not shown, it is well settled that Police Courts may sentence to an infamous punishment. Without taking time to consider this, we will take another view of the question. Suppose that an act were passed in these words, "Police Courts shall have jurisdiction of all larcenies, when the value of the property stolen shall not be alleged to exceed fifty dollars, and may sentence any person convicted of such larceny to imprisonment in the House of Correction or State Prison for — years. Suppose also that trial by jury on appeal will not satisfy the constitution, that imprisonment in the State Prison is infamous, and that imprisonment in the House of Correction is not. There is nevertheless no constitutional objection to giving the jurisdiction or the power to sentence to the House of Correction. It is only the provision for a sentence to the State Prison which is contrary to the bill of rights; it is that part of the law only which the legislature shall not pass, and it would be therefore void, and the court could not sentence under it. So in the present case, where a sentence to the State Prison is authorized by a reference to another statute, it is the same as if the authority made part of this act; and the constitutional objection, if it applies at all, applies only to that kind of sentence and that part of the act, the sentence to an infamous punishment.

But the constitutional objection, as it is made, also overturns the distinction between simple and aggravated larceny, which has been the ground of that and all the former objections. If it shows that the act of 1855 gives no jurisdiction in *aggravated larcenies*, it shows also that it gives no jurisdiction in *simple larcenies;* for by the act the court may sentence *for them to an infamous punishment.* If we have no jurisdiction in simple larcenies, the distinction between simple and aggravated fails. If the act gives jurisdiction in simple larcenies, the objection that we cannot so sentence, fails. If because we could so sentence, it gives no jurisdiction in simple larcenies, and thus the distinction in it between simple and aggravated larcenies as to jurisdiction fails; the objection should have been, that the pro-

vision respecting larceny gave no jurisdiction at all, and the act was wholly null and without effect.

The results of our examination seem to us to be, that the increase of jurisdiction in both simple and aggravated larcenies previous to 1855, shows the tendency of the legislative mind, and makes it probable, that they *would* then intend to increase it further in both; that in the usual sense of the word "larceny" in the books, it includes both simple and aggravated, and that chapters under that title do actually contain both; that when one chapter does not contain both, simple larceny is usually the title of the chapter which contains it; that if there were one chapter entitled "All Larcenies," there could be no subsequent chapter concerning other larcenies; that in the Revised Statutes and subsequent acts, when simple larceny is meant, it is so expressed, either by using the word "simple," or in one instance by the common method of dropping the aggravation contained in previous definitions, as is done in respect to arson and other offences; that when aggravated larceny is intended, the aggravation is expressed; and that in every instance, which we have seen, where the word "larceny" is used alone in the statutes, it includes both classes; that if this were not so, the use of the word "all" in the act of 1855, would settle the construction there; that the division of larcenies into four classes with respect to jurisdiction before passing the act of 1855, so confused and complicated, and having so little regard to degrees of aggravation, showed a reason why the legislature should apply a simple remedy to the whole, and not legislate concerning a part only; that in an act to increase jurisdiction no express words are necessary to repeal the former limitation, and that none were used in previous acts increasing the jurisdiction of Police Courts; that the objection that our constitution gives no power to Police Courts to sentence to the State Prison, cannot avail against it, because the opposite construction gives the same power; that the length of imprisonment authorized, does not show our construction to be wrong; because the highest limit of punishment does not in practice affect the punishment of smaller offences; because no evil from this cause had existed in other courts, and the abuse could arise in any court only from the appointment of unfit judges; that the constitutional objection cannot prevail, for the usual construction of the constitution and the practice under it, gives the defendant his trial by jury if he

pleases, which he had in other cases only if he pleased; and it gives him another trial and chance of acquittal besides. It adds to his rights, and takes away none; that if the objection could avail at all, it would not apply to the part of the statute giving jurisdiction, nor to the part giving power to sentence to a punishment not infamous; but to that part only which authorized an infamous punishment; that the opposite construction destroys the distinction contended for between simple and aggravated larcenies by taking away the jurisdiction in simple larcenies also, as we could for them inflict an infamous punishment, and thus the act is wholly without effect; that the statute of 1855 shows a uniform design, a design in each section to meet a similar difficulty by a similar remedy, and a provision in the third section applied to both previous sections to meet an emergency not to be expected, except in aggravated offences.

We return again to the words "all larcenies" in the act of 1855. Our examination has only proved what we thought plain without it, that they are used in their obvious sense. Those who allege that words are used in any other sense, that they may have two meanings or a doubtful meaning, must prove it. It is not to be assumed. If the word in the statute were "larcenies," we do not see how it could be limited. It must, however, be presumed that the legislature meant something by the word "all." Although it might not be necessary, they probably thought it more safe, and in this way it has its effect. We are unable to bring our minds to the construction which the legislature took so much care to exclude, and which limits "larcenies" to one kind of larcenies, still less to that which makes "all" mean "some" or "some kind," and supposes that beside "all larcenies," there are also some other larcenies.

We are, therefore, unanimously of opinion, that this court has by the act of 1855, c. 448, jurisdiction to try and sentence in all larcenies, simple and aggravated, "where the money or other property stolen shall not be alleged to exceed the value of fifty dollars."

Supreme Judicial Court of Massachusetts. Suffolk County, March Term, 1857.

DANIEL H. DEARBORN *v.* ISAAC AMES.

The St. of 1856, c. 284, entitled "An act in addition to the several acts for the relief of insolvent debtors, and the more equal distribution of their effects," creating courts of insolvency with judges to be appointed like other judicial officers and to hold during good behavior, and transferring to these courts all the jurisdiction that commissioners of insolvency previously had, "under the acts to which this is in addition," is not unconstitutional as infringing the 19th article of amendment to the constitution, whereby commissioners of insolvency are required to be elected by the people. And this act transfers jurisdiction over insolvent corporations as well as over individual debtors.

AN amendment to the constitution of Massachusetts, known as the nineteenth amendment, was duly passed through the legislatures of 1854 and 1855, and ratified by the people in May of the latter year. It reads thus:

"The legislature shall provide, by general law, for the election of sheriffs, registers of probate, commissioners of insolvency, and clerks of the courts, by the people of the several counties, and that district attorneys shall be chosen by the people of the several districts, for such term of office as the legislature shall prescribe."

The legislature of 1856 provided for the election of commissioners of insolvency by the people accordingly, to hold office for three years. At this time the whole original jurisdiction under the insolvent laws of the State was vested in the commissioners, and such was the case also when the constitutional amendment was adopted. This same legislature afterwards passed an act, St. 1856, c. 284, entitled "an act in addition to the several acts for the relief of insolvent debtors, and the more equal distribution of their effects," by which courts of record, to be called courts of insolvency, were established, one in each county, with judges to be "appointed, commissioned, and qualified in the manner prescribed by the constitution," "and to hold office during good behavior." These judges were to "have and exercise all the jurisdiction, power and authority that commissioners of insolvency now have and exercise under and by virtue of the several acts to which this is in addition." A register of insolvency in each county was also provided for, and the courts were to have a seal, to have power to make rules subject to the revision of the Supreme Court, and power to punish for contempt, and judges and registers were to be paid by salary. In all these respects

the tribunal thus established was to have the appearance and the substance of a *court*, and its judges would clearly be *judicial officers*, a question somewhat mooted in respect to commissioners, who had been generally considered not to come within this class.

Mr. Ames, the defendant, held the office of commissioner of insolvency for Suffolk county, under the old law, and was also appointed judge of the new court. In August, 1856, the Boston Steam Engine Company, an insolvent corporation, in order to secure an equal distribution of their effects among their creditors pursuant to St. 1851, c. 327, concerning insolvent corporations, presented two separate petitions to Mr. Ames, one addressed to him as judge and the other as commissioner; the former was entertained and the latter dismissed. The plaintiff in this case, who was a creditor of the corporation, with a view to test the construction and constitutionality of the act of 1856, presented a petition to this court, praying that Judge Ames might be ordered to proceed with the case as commissioner, and that his proceedings as judge might be superseded.

H. Gray, Jr. (with whom was *F. E. Parker*,) for the petitioners.

1. The 19th amendment to the constitution provides for the election by the people of commissioners of insolvency. These officers were well known to the law, and their powers and duties clearly defined and understood; and the legislature could not transfer these duties to officers appointed by the governor and holding during good behavior, for this would defeat the clear intention of the constitution.

Thus in New York, the constitution provided that county clerks should be chosen by the people; and a statute transferring most of the duties of county clerk of New York to a city clerk to be appointed by the judges, was held to be unconstitutional and void. *Warner* v. *The People*, 7 Hill, 82; 2 Denio, 275.

If this statute were constitutional, the whole of the 19th article of amendment might at any time be virtually annulled by the legislature, who have only to enact that the sheriff (inasmuch as he exercises judicial functions in some cases) shall be called a judge, and shall hold during good behavior; and to substitute a judge advocate for each district attorney, and a recorder in place of each register and clerk.

Commissioners of insolvency have never been considered

judicial officers. They have always been appointed for a term of years, and removed at the pleasure of the governor, while the constitution provides that judicial officers shall hold during good behavior. To the same effect is the opinion of this court in *Sims's case*, 7 Cush. 303. Granting that the legislature may distribute the duties and powers belonging to any class of offices, to and among officers of that class, at their discretion, and granting also that they may abolish any office which they consider unnecessary, yet they cannot transfer the duties of any existing office mentioned in the constitution, to persons belonging to a different class and appointed and holding by a different tenure, for this is an evasion of the constitution.

2. The statute in question does not apply to insolvent corporations, but only to individuals. The law concerning insolvent corporations is a separate code, quite analogous indeed to that concerning natural persons, with only such changes as the nature of the case seemed to require, but passed at a later period, and as a distinct substantive enactment, and the statute now under consideration makes no mention of this latter code, nor of corporations, but only purports to give judges of insolvency the jurisdiction which commissioners of insolvency had under "the several acts for the relief of insolvent debtors." These acts did not apply to corporations. *Sargent* v. *Webster*, 13 Met. 503. The new statute does not contain any provisions especially applicable to corporations, though it does alter, more or less, every other branch of the insolvent law.

A. H. Fiske, for defendant.

1. The General Court "have full power and authority to erect and constitute judicatories and courts of record of other courts, and to give them jurisdiction over all matters, criminal or civil." Constitution, ch. 1, § 1, art. 3.

Also, by art. 4, to make all manner of wholesome and reasonable orders, laws, &c., and to name and settle annually, or provide by fixed laws for the naming and settling of all civil officers, the election and constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties, powers and limits of the several civil and military offices," &c.

In the present case the changes in the system are not merely colorable, but are substantial. The jurisdiction is now vested in courts of record, with a permanent clerk, a seal, with stated terms or sessions, with power to keep order and appoint officers to that end, to punish for con-

tempt, to summon witnesses, to issue commissions and executions to award costs, and with judges paid by fixed salaries. The commissioners were not judicial officers, but the new judges clearly are so, and it is competent for the legislature to transfer jurisdiction from the one class to the other. The true construction of the 19th amendment is, that so long as the legislature shall think best to have commissioners of insolvency, they shall be elected.

2. The law applies to insolvent corporations as well as to natural persons. The statute relating to the former was passed indeed at a later period, but it differs very slightly in its terms from the earlier statute which related to individuals, and the whole make but one system, which always have been, and are evidently intended to be administered by the same officers.

The opinion of the Court, which, as well as the argument, we are obliged to condense very much, was delivered by

Shaw, C. J. — We are of opinion that this statute is constitutional. Where the constitution provides the mode of appointment for any officer, or where it describes his functions, as for instance, all judicial officers, it is not competent for the legislature to order a different mode for such officers in the one case, or of persons who are to exercise such functions, in the other. It may be sometimes difficult to decide what officers come within a general description, but when this point is settled, the constitutional mode of appointment must be followed.

But if the object of a statute is to establish a new jurisdiction, or a new arrangement of powers and duties of officers created by such statute, either not designated in the constitution by their title, or not within a class specified by a definite description, it is competent for the legislature to prescribe the mode in which such officers shall be elected or appointed, although the effect and operation may be to transfer powers from officers elected under the provisions of the constitution, to a class to be thus newly appointed. Such has been the practical construction of the constitution from the beginning, of which numerous examples may be given. Thus the Court of Sessions was originally composed of all the justices of the peace of the county, and invested with considerable criminal jurisdiction; then composed of a small number of judges; then its judicial powers were transferred to the Court of Common Pleas, and its administrative powers to com-

missioners of highways, and still later to county commissioners, and finally the court itself abolished. So of the attorney and solicitor-general. The latter officer was named in the original constitution, and the mode of his appointment (by the governor and council) provided for. But the legislature did not think it expedient to create any such office for some twenty years after the foundation of the government. Afterwards, the criminal business having largely increased, the office was created; after the separation of Maine from Massachusetts, it became extinct by the operation of a law which enacted, that whichever of the offices of attorney and solicitor-general should first become vacant, should not again be filled. So the office of attorney-general has been abolished, its duties being distributed among the district attorneys, and again revived. At present, the constitution as amended provides for the election of the attorney-general by the people of the State, and of the district attorneys by the people of the several districts. But if the legislature were to reëstablish the office of solicitor-general, we think that he would properly be appointed by the governor, although the other officers of like duties are elected, because the constitution has declared that the officer so designated by his title, shall be so appointed.

So in the organization of the militia. There is a provision in the constitution that major-generals shall be chosen by a concurrent vote of the two houses of the legislature. Now, supposing that in the progress of military science and practice, it should be found expedient to provide for the appointment of officers of a higher grade, as lieutenant-generals, or field-marshals, it would seem competent for the legislature to create the office, and to provide for its being filled by popular election or by executive appointment, although most or all the powers and duties of the major-general would thus be transferred to the new officer.

We do not consider the words "commissioners of insolvency," as used in the constitutional amendment under consideration, to be words of designation, and intended to include all persons who should ever hereafter be intrusted with the jurisdiction over insolvent debtors, but rather as words of title, in the same manner as attorney-general, county commissioners, etc. And considering the words thus, and in view of the practical interpretation which has always been given to the constitution, we think it compe-

tent for the legislature to transfer the powers of commissioners to officers of a higher grade, with greater powers and a more permanent tenure, when in the opinion of the legislature the exigencies of the times, and the perfection of a code, which from small beginnings has grown to be an important system, required such a change.

We think also that insolvent corporations are included within the words of the law, and as the design of the legislature evidently was to make a change of system in the administration of the insolvent laws generally, that corporations ought to be held to come within this remedial enactment.

NOTE. — Just before this case was argued, the Senate applied to the justices of the Supreme Judicial Court for an opinion upon the constitutionality of the statute here discussed, and the answer returned was, of course, in accordance with the opinion given above. One of the judges, however, put his acquiescence upon the single ground that the act was not so clearly unconstitutional, as to make it the duty of the judicial department, in view of the great interests involved, to declare it void. We have thought the case an interesting one, and one involving a nice point of constitutional law. The decision seems to rest substantially upon the basis which we indicated last June, when, in our review of the legislation of the year, we alluded to this law, namely, that the jurisdiction of insolvent estates having formerly been vested in officers not judicial, but many of whose powers and duties were of a judicial nature, the legislature has thought it expedient to transfer these powers and duties to judicial officers, who are officers of a higher class, and whose tenure and appointment are different. But suppose the very same duties were to be performed by persons of no greater dignity, could the legislature, by a mere alteration of the name, lawfully create a different tenure? Take for instance, an example put by the court. The office of solicitor-general has been extinct for many years, during which time all similar officers are made elective. If the office of attorney-general were to be now abolished, and that of solicitor-general revived, would it not appear to be an evasion of the fundamental law as now established? In this case, there would seem to be no change, either in the duties performed or in the grade of the officers to perform them, which would justify a departure from the letter and apparent meaning of the constitution. But even if the office of attorney-general were not abolished, but that of solicitor-general merely added to the existing system, we think it a more difficult question than the one presented by the case here reported, whether the legislature should not be bound to conform to the clearly expressed general intention of the fundamental law, in the mode of appointments presented for officers of this class. And so of major-generals. We consider it a still more doubtful point than either of those above considered, whether the legislature can create a new office higher than the highest now known under that of commander-in-chief, and provide for its being filled in a mode different from that in which the highest now known is by the constitution to be filled.

Cases in Vermont.

Windsor County. Supreme Court. March Term, A. D. 1857.

TOWN OF SHARON *v.* TOWN OF CABOT.

Paupers — Settlement.

By the present statute of Vermont, children do not take the after-acquired settlement of the mother, if the father had a settlement in the State at the time of his decease. The statute in that case provides, that the children shall *retain* the settlement of the father *till they acquire one in their own right.* The rule of the common law was different, and so it was in this State till the revision of 1839. Before that, if after the death of the father the mother acquired a new settlement in her own right, the children forming part of her family took that settlement.

Residence is a question of fact merely, and is concluded by the finding of the jury.

DOWNER *v.* BAXTER.

Jury — Organization and conduct.

Held, that where from some misunderstanding of the officer, a jury during their consultation, are allowed to separate for the purpose of taking refreshments, and immediately return and finish their deliberations and return a verdict, there being no evidence of any improper practices in regard to them, it is not ground of error that the court refused to set aside the verdict.

The oath of a juror in such case, may be received to refute any inference of improper conduct, although not for the purpose of proving such conduct.

INGALLS *v.* BROOKS.

Contract — Payment.

The father conveyed his land and other property to his son, conditioned that the son pay all his debts, and afford him and his wife a suitable maintenance.

Among the debts of the father was a note of $100, given to a daughter. The daughter remained some time at the house of the son, but subsequently married. Her husband claimed payment of the note, and the son claimed that the sister owed him enough for board to pay it. The father told the husband to get what he could out of the son and he would pay the balance. The husband settled with the son by receiving the money for half the note, and a release of his claim for boarding his sister, and surrendered the note to be cancelled, the son being entirely ignorant of the agreement of his father.

The husband sued the father upon the note and obtained judgment, and levied upon the land as the property of the father. All other debts, except the mortgage upon the land, had been paid by the son, and that had been greatly reduced.

Held, that as to the son the debt was paid, and the agreement with the father must be regarded either as a fraud upon the son, or a subsequent debt against the father, and in either view it was not such a debt as could legally override the title of the son.

Held, that the judgment against the father being *inter alios acta*, was no evidence against the son.

LYMAN *v.* EDGERTON.

Principal and agent — Unauthorized act of public agent.

The statute makes it the duty of town clerks to register deeds, and to keep an alphabet of such titles, and to exhibit the records to all who may desire to examine them. The plaintiff was in treaty with the town clerk of Windsor, for the purchase of a farm belonging to him. He inquired of him if there was any incumbrance upon the title, and was assured there was not. In consequence of such assurance he did not ask to examine the records. In fact, the land was largely incumbered, and this was known to the clerk and properly recorded, but not put upon the alphabet. The statute makes towns liable for any failure of their clerks in the performance of their duty.

Held, the town are not liable in this case. The representation of the clerk in this case was clearly unofficial. The plaintiff should have examined the records, or asked to do so and been reused, in order to make the town liable for the act of their clerk.

PATRICK *v.* ADAMS.

Arbitration — Revocation.

The parties made a submission of all matters in dispute between them to arbitration. The submission was under seal, but by mistake did not include a chancery suit between them. On discovery of this omission, the plaintiff agreed orally to have it included, and that the bond should be so altered as to include it. But after the arbitrators assembled declined to have the alteration made, whereupon the defendants revoked. This suit is upon the bond.

Held, that plaintiff's agreement to have the bond altered did not merge the bond, but was, at most, a new and independent agreement to submit the chancery suit to the same arbitrators, and that his revocation of this submission was no legal excuse for defendants' revocation, and could not bar the right to recover upon the bond.

FRASER *v.* TUPPER.

Evidence — Experts.

This was an action for damage in consequence of the plaintiff improperly setting fires upon his own land. Upon the trial the defendant offered to show, by farmers who were experienced in

clearing land, for which purpose the fires in this case were set, and who were upon the ground the day the fires were set, and noticed the state of the wind and the distance and direction of plaintiff's coal, which was fired, that it was safe and proper to set the fires. The testimony was rejected.

Held, that it was properly rejected, the inquiry not being matter of science or skill, and the witnesses not professing to possess any peculiar skill upon the subject. It was the very question to be determined by the jury, and the testimony offered was not calculated to aid them more than the opinion of witnesses under ordinary circumstances, which is not competent.

Nutt *v.* Wheeler.

Officer — Trover.

This was trover for a barrel of gin, attached by the defendant upon the plaintiff's debt. It appeared that about seven gallons were abstracted from the barrel in some way, while it was in the defendant's possession, but how did not appear. In the plaintiff's absence the remainder was carried off by some person claiming to own it.

Held, the officer was not liable in this form of action. If he was guilty of any want of care in keeping the property safely, the proper action is case.

Baxter *v.* Donner.

Contract — Waiver and merger — Fraud.

This action is brought upon an indemnity given by defendant to plaintiff, upon his executing a receipt to the officer for property attached on mesne process. After judgment and execution, the plaintiff and defendant made a new contract, by which plaintiff executed to the creditor, jointly with defendant, and as his surety, a promissory note for the amount of the debt, and defendant gave security to plaintiff by depositing collaterals. The collaterals had been attached by trustee process, and were of no avail to plaintiff.

Held, that *primâ facie* the new contract being of the same grade, superseded the former contract of indemnity. But if the plaintiff was induced to enter into the new contract by the fraud and misrepresentation of defendant, he might still sue upon the original contract of indemnity. But this is matter of fact, and must be distinctly found by the jury.

Braley *v.* French.

Co-sureties — Whether debt can be kept alive for benefit of co-surety.

The questions involved in this case are, whether a co-surety may procure a third party to pay the amount of the debt to the creditor, and take an assignment of the debt to himself, for the purpose of making available an attachment of the land of his co-surety, such co-surety having in the mean time failed, and being destitute of property, and the principal debtor being also insolvent. The execution was only levied upon such amount of the debtor's property

as it was his duty to pay, as between the co-sureties. The defendants claimed title to the same lands from the debtor, by deeds subsequent to the date of the attachment. This third party was indemnified in the purchase of the defendant, by a conveyance of the co-sureties' property, and it was understood to be solely for his benefit.

Held, that the transaction did not amount to a technical payment of the debt at law, as was held by this court, in *Ætna Ins. Co.* v. *Wires and Peck Chit. Co.* 1855. (19 L. R. 456.) Co-sureties stand in a similar relation to each other to that of surety and principal. In either case the law implies a promise of indemnity. And one surety may legally and equitably procure a friend to purchase in the debt for his benefit, for the purpose of making a preceding attachment of the co-surety's land available, to the extent of his obligation to indemnify his co-surety as between themselves.

In such case a junior incumbrancer upon the land stands in the relation of a privy in estate, and as such the judgment and levy, so long as they remain unreversed are conclusive, the same precisely as against the debtor himself.

Neither the debtor, or junior incumbrancer, or the estate, can properly attack either the judgment or levy in this manner.

The appropriate remedy in such case is probably in equity. And a court of equity will not enjoin the party, until he has obtained such relief as by the rules of equity he is entitled to claim, and that is all which this case shows has been sought.

So that both, by the strict rules of law, and by the rules of courts of equity, the plaintiff in interest is fairly entitled to enforce one half the original debt against the co-surety in this form.

Parker *v.* Kendrick.

Mortgage of personal property — Possession.

The plaintiff and another were partners in the tanning business. The plaintiff sold out his interest to his partner, taking a mortgage of the whole stock in the business to secure the purchase money and another debt, the vendee stipulating to keep the value of the stock good, but in other respects having the control of the business. The vendee also agreed that the vendor should have the occupancy of all the buildings for the purpose of maintaining the requisite possession of the mortgaged stock. It did not appear that the workmen who carried on the business knew that plaintiff had any possession or control there.

Held, the plaintiff had no such exclusive possession and control of the property, as to perfect and protect his claim upon the stock against the claims of other creditors and *bonâ fide* purchasers.

Scofield *v.* White, Trustee.

Trustee process — Infant trustee.

Held, that an infant is liable under the trustee process, for personal property in possession belonging to the principal debtor, and for any indebtedness for necessaries.

That where the court below adjudged an infant liable upon an indebtedness to the principal debtor, it not appearing whether the same is for necessaries or not, it will be presumed to have been so. All reasonable presumptions being in favor of the judgment.

SCOFIELD *v.* THOMAS, TRUSTEE.

Trustee process.

One is not liable to be summoned as trustee, because he holds securities for money in his hands belonging to the principal debtor.

GALLUP *v.* WOODSTOCK.

Jurisdiction of Supreme Court.

This court, as the supreme judicial tribunal of the State, and solely authorized to issue writs of error, certiorari, &c., has no control over the county court, for laying a street through a building, or chiefly for the accommodation of a court-house and town-house, the law having established no certain and fixed rule in regard to these matters. Hence each case is to be judged of from its peculiar circumstances, as matter of fact rather than law; and its decision rests exclusively in the discretion of the tribunal to whom the statute has confided the authority to lay out highways and streets.

Orange County Supreme Court. March Term, 1857.

TARBELL & Co. *v.* BROWN.

Audita querela — Judgment obtained by fraud.

This was *audita querela*, to set aside a justice judgment.

It appeared the parties were in negotiation for settling a pending justice suit between them by arbitration. The time set for trial having transpired, it was agreed the case should be continued and tried by the justice at some future day, unless the parties in the meantime should settle the controversy by arbitration, or in some other mode. The plaintiff in the principal action, defendant in this, took judgment.

Held, the same shall be vacated and set aside.

ORMSBY *v.* MORRIS.

Effect of receipt to officers.

The plaintiff joining in a receipt to the officer for property attached on mesne process, is not a release of the officer from all liability for the property. It may be so to prevent circuity of action, when it appears that the plaintiff is seeking to recover of the officer for the very same thing, for which he is, in another form, liable to the officer. But where it appears that the suit is in the plaintiff's name, for the benefit of other parties, it will have no such effect in any case.

PAGE *v.* BALDWIN.

Trustee process.

A recognizance taken in severalty to trustees, in a process of foreign attachment, cannot be sued jointly in the names of all the trustees, even where their liability depended upon the same question, and a general judgment of discharge was entered in their favor.

The judgment of discharge of a trustee in such case is always in legal effect several, and should be so in form.

BLANCHARD *v.* SCHOOL DISTRICT.

School certificate to teacher when to take effect.

This is an action to recover the wages of a teacher. The only question is in regard to the certificate of qualifications from the superintendent. The statute requires the teacher to obtain this before teaching. The superintendent is required to make personal examination into the qualifications of teachers before giving certificate. It was held by this court long since, that if the superintendent gave a teacher the required certificate without examination, it was sufficient. In the present case, the superintendent made out the requisite certificate for the plaintiff, and intended to deliver it, and supposed he had, but did not.

Held, that under the circumstances the certificate must be regarded as taking effect from its date, and not from its delivery. The act which gives it effect and validity being the decision of the superintendent of the qualification of the teacher, upon such evidence as is satisfactofy to him.

DAVIS *v.* HEMMINGWAY.

Mortgage — Foreclosure — Parties.

The trustee and all the *cestuis que trust* are necessary parties to a bill in equity to foreclose a mortgage. And no decree will be allowed, where the exception is taken, till the *cestuis que trust* are made parties.

ORANGE *v.* HILL AND SANBORN.

Appeal — Mandamus.

Justices who make an order of removal of a pauper, and who are informed by the agent of the town to which the removal is made, of his desire to appeal, in such a manner as to satisfy them that *he* intended it as an appeal, and supposed he had appealed the case, should certify the appeal in due form, and if they decline to do so, will be compelled by suit of mandamus from this court.

BLAKE *v.* BURNHAM.

Covenants real — Damages — Interest.

The rule of damages for the breach of the covenant of seizin in a deed of land, is the consideration paid and interest. The in-

terest is given, by way of damages, for the non-payment of the money, which become due immediately upon the execution of the deed. And the rate of interest, by way of damages in any such case, is not affected by the rate or mode of computing interest on the securities given. That is matter of contract between the parties. But interest for delay of payment is fixed by law at *six per cent.*, and is simple interest always.

Taxes paid upon the land are not recoverable under this covenant, and probably not under any covenant.

If the deed contains other covenants running with the land, they should be released before the party has execution upon the amount recovered on this covenant, as otherwise the defendant may be compelled to pay the amount twice over to different parties, and when this judgment will be no bar.

Caledonia County. April Term, 1857.

Stone *v.* Knapp.

Trespass — Abuse of license.

This was an action of trespass. Plea, license. Replication, new assignment, *extra viam.* The proof upon trial showed, that defendant had license to pass over plaintiff's field, until he could obtain a public highway. In doing so he left the bars down, whereby cattle entered and did damage. The court below held the defendant liable for the damages done by such cattle.

But it was *held* here, that as the proof did not show a distinct trespass beyond the limits of the license, it must be regarded as a mere abuse of a license in fact, which will not render the party liable in trespass, but only in case for breach of contract or duty.

The case might be otherwise if the license had been given upon express condition of becoming void, upon the very abuse here complained of. But nothing of that appearing in the case, it must be brought within the general principle of abuse of license in fact, which will never render the party a trespasser *ab initio.*

And in case of an authority in law to enter one's field, or to make distress, or for an officer to attach goods, the abuse must be something more than mere nonfeasance to constitute the party a trespasser *ab initio.* It must be some positive abuse of the authority, and of such a character as to evince a purpose, at the time of the entry, to use the license as a shield merely, and a pretext to cloak the abuse.

Hutchins *v.* Marshall.

Statute of limitations.

This was an action for several tierces of starch, purchased by plaintiffs of some third party, upon whose debts the defendant had attached the same property, and subsequently sold it upon execution. Pleas, general issue and statute of limitations.

The plaintiffs' purchase was made late in the evening, and the starch was at the time in the shop of one Hadley, under lock and key. Plaintiffs went to the shop that night, but could not find Hadley. They also informed defendant early in the morning of their purchase, he having leased the shop to Hadley, and defendant promised to procure the key of the shop for the purpose of enabling plaintiff to take possession of the starch. But instead, he went and made the allotment for his own benefit. The term of the statute of limitations had run, since the attachment, but not since actual sale.

Held, that to perfect a sale of goods in this State as against the creditors of the vendor, there must be a substantial and visible change of possession, where the property is of such a nature as to admit of delivery.

That property of this kind is capable of delivery, and a change of possession should therefore have been made, in order to protect the plaintiffs' title against subsequent attachments.

That the rule allowing the party reasonable time to obtain possession of the goods, which obtains in some of the American States, only applies where the want of such change of possession is regarded as a badge of fraud, or *primâ facie* evidence of fraud, and will not apply in this State, where the want of such change of possession leaves the sale imperfect, and is therefore conclusive evidence of fraud as against creditors.

That for the same reason mere notice to the party is of no avail, as it is but notice of a defective sale, which he is not bound to regard.

That the cause of action in trover accrues from the *taking of the property*, and it is not competent for the plaintiff to waive the taking and go for a conversion by the sale upon execution.

Cobb *v.* Hall.

Statute of Frauds — Action for money paid.

This was a contract for the sale and purchase of land, not in writing. The plaintiff paid $100 towards the price. The defendant was ready and willing at all times, to perform the contract on his part, which the plaintiff refused to do, but sought, in this action, to recover back the money paid, on the ground of the statute of frauds.

Held, that the contract was perfectly binding as matter of defence, and that the plaintiff could not recover for anything done under the contract, so long as the other party was ready to perform the contract on his part.

Part payment, in such cases, is none the less part performance of the contract, because it is not a ground of equitable relief. Courts of equity refuse to interfere in such case, because the recovery of the money is full compensation. But the money cannot be recovered in all cases, but only in those cases where, if possession

had been taken, equity will decree specific performance, *i. e.*, where the vendor refuses to execute the proper conveyance.

If the vendee, after paying the price, part or all, is unwilling to accept his equivalent under the contract, he must be content to lose what he has paid. The vendor may justly insist upon paying, in the mode stipulated in the contract.

Bray *v.* Wheeler.

Parent and child — Emancipation.

This was an action by an infant son, under fourteen years of age, to recover his wages. The father had relinquished to the son his earnings. But it was objected, that such an arrangement between father and son, at so early an age, is against sound policy, and courts will not sanction it.

Held, that this is not a question which defendant can make in defence of this action. The judgment being under the facts, did no doubt bar the claim. And that is sufficient for defendant in this action.

But upon general principles it rests in the discretion of the father at what age he will emancipate his son, and as this will not exonerate the father from the duty of maintenance, under the statute, it is nothing in regard to which the public can interfere. And as the creditors of the father have no interest in the earnings of children, which the law will recognize or protect, they cannot complain.

Ryegate *v.* Wardsboro'.

Paupers — Settlement.

This was an appeal from an order of removal. The statute of Vermont allows an order of removal only in the case of persons which "have come to reside in any other town," and provides, "that if any person having a legal settlement in any town, shall thereafter reside in any other town for the space of seven years, he shall thereby gain a settlement in such town."

Held, that persons *non compos mentis* are not subject to an order of removal under the statute, and that they cannot gain a settlement by residence, not being *sui juris*.

They are to be treated as transient paupers under the statute, and the expenses of their support may be recovered in the mode pointed out, of the town where they belong.

Stevens *v.* Damon.

Justice of the peace — Jurisdiction.

Where the jurisdiction of a justice in an action on book, is made to depend upon the debit side of the book, and judgment is rendered upon trial without any objection as to the jurisdiction, the judgment is valid, and its effect cannot be defeated in a subsequent

action, by proving that at the time of rendering judgment, the plaintiff had upon his book charges exceeding $100, a portion of which he regarded as settled, but which in fact were not.

WATERFORD *v.* FAYSTON.

Pauper — Settlement.

In determining the settlement of paupers in this State, a residence out of the State after a settlement is acquired here, is not to be taken into the account, when the pauper returns again to this State.

But during such absence and residence out of the State, the paupers' settlement here is effectually suspended, so that his children of adult age residing here, but who were born out of the State, and who never resided in the State with their father, cannot be said to have a derivative settlement from the father.

But if, under such circumstances, the father came to reside in the State, his former settlement revives, not only as to himself, but as to his children of adult age even, the statute providing that "children shall have the settlement of the father till they gain one in their own right."

IRESON *v.* FISHER AND TRUSTEES.

Trustee process — Costs.

A trustee, under process of foreign attachment is liable for personal property in possesion, and which has been conveyed by a sale, fraudulent as to creditors.

The tools of one's trade are exempt from attachment, notwithstanding the party may have been for years engaged in other occupations, such other business being at the time closed, and no definite occupation assumed afterwards.

Where the trustee and creditor both except to decisions in the court below, and judgment is affirmed, the trustee is not entitled to retain his costs out of the fund, for which he is made chargeable.

Notices of New Publications.

DIGEST OF THE OPINIONS OF THE ATTORNEYS-GENERAL OF THE UNITED STATES, with references to Leading Decisions of the Supreme Court. By C. C. ANDREWS, Counsellor at Law. Washington. Published by R. Farnham. 1857.

This is a work which no lawyer interested in the scientific study of his profession will allow himself to be without. The opinions of the Attorneys-general are not digested in any of our Digests, and therefore the prin-

ciples announced in them were, before this work appeared, accessible only by reading the volumes themselves. The topics here discussed are the leading heads of international, public, constitutional and municipal law, which have arisen in the management of the government since its origin. They are discussed not as an advocate discusses the merits of his client's cause, but by a "public officer acting judicially, under all the solemn responsibilities of conscience and of legal obligation." Some of them, as in the case of Mr. Cushing and Mr. Black, have left the highest legal tribunals of the States, — others, such as Johnson, Legare, Rodney, Wirt, Taney, and Pinkney, have achieved a reputation more general than most judges. We are not thoroughly familiar with the first five volumes of the Opinions, but with the last two volumes we are well acquainted, and from that acquaintance we have brought this volume to what we consider the true test of a Digest, viz. Does it contain *all* it ought to contain, and does it contain it in the right place? And we have answered both these questions affirmatively. Mr. Andrews is well fitted by his accuracy and exactness for a work of this kind, while his long service in the office of the Solicitor of the Treasury has made him a thorough master of these Opinions. This Digest, with the references to the leading decisions of the Supreme Court, constitutes an excellent epitome of American public law.

Boston Board of Trade. Third Annual Report of the Government, presented to the Board at the Annual Meeting on the 21st of January, 1857. By Isaac L. Bates, Secretary. Boston: George C. Rand & Avery, Printers. 1857. pp. 670.

This Report contains many interesting statements and communications upon the trade and commerce of Boston, drawn up by the most competent hands, and many things of still more general interest, such as explanations of the currency and of weights and measures. The profession will find also in an accessible form, the tariffs of 1816 and 1857, some of the recent general regulations of the treasury department, and an abstract of the decisions and instructions of this department upon the tariff of 1846, drawn up by Chauncey Smith, Esq. The Board of Trade is evidently prosperous and highly useful.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
Allen, Robert	Westfield,	March 10, 1857.	John M. Stebbins.
Andrews, Alfred A.	Boston,	" 11,	Isaac Ames.
Archer, Wm. jr. (*a*)	Salem,	" 24,	Henry H. Fernald.
Bacon, Nathan H.	Barre,	" 21,	Alexander H. Bullock.
Barker, Thomas T. (*b*)	North Chelsea,	" 19,	Isaac Ames.
Bassett, Thomas M.	Taunton,	" 13,	Joshua C. Stone.
Batty, John T. } (*c*)	Springfield,	" 9,	John M. Stebbins.
Batty, Joseph H. }			
Bircumshaw, Jonathan (*b*)	Lenton, England,	" 19,	Isaac Ames.
Brackett, Jacob	Woburn,	" 6,	L. J. Fletcher.
Brown, J. Warren (*d*)	New York,	" 27,	Alexander H Bullock

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
Burbank, Thomas F.	Salem,	March 25,	Henry B Fernald.
Carlton, Wm. A.	Charlestown,	" 14,	Isaac Ames.
Casey, Wm. A. (*e*)	Worcester,	" 13,	Alexander H. Bullock.
Curtis, James M.	Worcester,	" 30,	Alexander H. Bullock.
Darling, Cortez	Worcester,	" 7,	Alexander H. Bullock.
Davis, Charles (*f*)	Grafton,	" 27,	Alexander H. Bullock
Deane, Asa	Somerset,	" 24,	Joshua C. Stone.
Drury, Orlando A. (*f*)	Grafton,	" 27,	Alexander H. Bullock.
Dudley, Barzillai	Springfield,	" 11,	John M Stebbins.
Ellis, Dudley (*g*)	Holliston,	" 12,	L. J. Fletcher.
Evans, Charles	Grafton,	" 27,	Alexander H. Bullock.
Fessenden, Charles B.	Gloucester,	" 2,	Isaac Ames.
French, Gustavus	New Bedford,	" 27,	Joshua C. Stone.
Frost, George W.	Waltham,	" 18,	L. J. Fletcher.
Gabriel, Samuel E.	New Bedford,	" 20,	Joshua C. Stone.
Gleason, Zelotes	Milford,	" 27,	Alexander H. Bullock.
Gorham, Clark J.	Roxbury,	" 10,	Francis Hilliard
Harding, Benjamin M.	Haverhill,	" 17,	Henry B. Fernald.
Johnson, William H. (*d*)	Worcester,	" 27,	Alexander H. Bullock.
Leland, Nathan C. (*g*)	Holliston,	" 12,	L. J. Fletcher.
Matthews, Samuel F.	Charlestown,	" 16,	L. J. Fletcher.
Morse, Robert M.	West Roxbury,	" 3,	Isaac Ames
Mowry, Stanford B.	Douglas,	" 6,	Alexander H. Bullock.
Muzzy, Nathan M. (*e*)	Worcester,	" 13,	Alexander H. Bullock.
Paine, James P. (*e*)	Worcester,	" 13,	Alexander H. Bullock.
Pingrey, Procter (*h*)	Bolton,	" 12,	Alexander H. Bullock.
Pope, William	Dedham,	" 23,	Francis Hilliard.
Porter, Joseph F. / Porter, Lewis (*i*)	Braintree,	" 14,	Francis Hilliard.
Prescott, Wm. Y.	Boston,	" 16,	Isaac Ames.
Pratt, Jairus	Boston,	" 30,	Isaac Ames.
Ramsdell, George F.	Worcester,	" 3,	Alexander H. Bullock.
Ray, William, jr.	Ludlow,	" 11,	John M Stebbins.
Raymond, Benjamin	Littleton,	" 24,	L. J. Fletcher.
Raymond, Joseph	Littleton,	" 13,	L. J. Fletcher.
Rogers, George G.	Upton,	" 27,	Alexander H. Bullock.
Ross, James	Boston,	" 2,	Isaac Ames.
Roundy, John P.	South Boston,	" 24,	Isaac Ames.
Russell, John P.	Malden,	" 31,	L. J. Fletcher.
Scattergood, Peter. (*b*)	Stapleford, England,	" 19,	Isaac Ames.
Shephard, Israel D. (*a*)	Salem,	" 24,	Henry B. Fernald.
Snow, Lorenzo (*d*)	New York,	" 27,	Alexander H. Bullock.
Stearns, Moses P. (*e*)	Worcester,	" 13,	Alexander H. Bullock.
Taft, Asahel D.	Worcester,	" 31,	Alexander H Bullock.
Taylor, John	Amesbury,	" 18,	Henry B Fernald.
Tenney, William P.	Boston,	" 27,	Isaac Ames.
Thayer, Alexander W.	Milford,	" 28,	Alexander H. Bullock.
Todd, Charles	Somerville,	" 7,	Isaac Ames.
Townsend, Charles (*h*)	Bolton,	" 12,	Alexander H. Bullock.
Washburn, Charles F. / Washburn, Henry S. (*j*)	Worcester,	" 5,	Alexander H. Bullock.
Washburn, Henry S.	Worcester,	" 5,	Isaac Ames.
Whitman, Jeremiah	Boston,	" 3,	Isaac Ames.
Whitney, Royal H.	Chicopee,	" 19,	John M. Stebbins.
Wilcux, Otis	Uxbridge,	" 7,	Alexander H. Bullock.
Williams, Charles B.	Boston,	" 10,	Isaac Ames.
Woodward, Alfred G.	Worcester,	" 9,	Alexander H. Bullock.

(*a*) Shepard & Archer.

(*b*) Barker and Company. "Business in Boston."

(*c*) Batty Brothers.

(*d*) Johnson, Brown & Co

(*e*) Hitchcock, Muzzy & Co.

(*f*) Drury & Davis.

(*g*) Firm not stated.

(*h*) Townsend & Pingrey.

(*i*) J. F. & L. Porter, "as copartners and individuals."

(*j*) Henry S. Washburn & Co.